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FEDERAL COMMUNICATIONS COMMISSION

*Reed E. Hundt, Chairman
James H. Quello
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**Ervin S. Duggan

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*Reed E. Hundt designated Charman effective November 29, 1993.
**Ervin S. Duggan resigned January 31, 1994.

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Federal Communications Commission Record

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Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-21

In the Matter of

Amendment of Section 73.202(b) RM-8427
Table of Allotments,
FM Broadcast Stations.
(Garapan, Saipan, Northern
Mariana Islands)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Inter-Island Communications, Inc. ("petitioner"), proposing the allotment of Channel 266C at Garapan, Saipan, Northern Mariana Islands, as that community's fifth local FM transmission service. Petitioner states its intention to apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 266C at Garapan, Saipan, Northern Mariana Islands, since it could provide the community with its fifth local FM transmission service. Channel 266C can be allotted to Garapan in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction at petitioner's requested site.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Garapan, Saipan	250C2, 258C1,	250C2, 258C1
Northern Mariana Islands	262C2, 280A	262C2, 266C, 280A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Peter Gutmann, Esq.
Pepper & Corazzini
1776 K Street, N.W.
Suite 200
Washington, D.C. 20006
(Counsel for Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

[1] The coordinates for Channel 266C at Garapan, Saipan, Northern Mariana Islands are North Latitude 15-12-26 and East Longitude 145-42-57.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-23

In the Matter of

Amendment of Section 73.202(b) RM-8439
Table of Allotments,
FM Broadcast Stations.
(Mabton, Washington)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by First Love Ministries, Inc. ("petitioner"), proposing the allotment of Channel 254A at Mabton, Washington, as the community's first local aural transmission service. Petitioner states its intention to apply for the channel, if allotted.[1]

2. In support of the proposal, petitioner states that Mabton is a small community located in Yakima County, southeast of Toppenish, and has a population of 1,482.[2] It also has its own school and local governing body.

3. We believe the public interest would be served by proposing the allotment of Channel 254A at Mabton, Washington, since it could provide the community with its first local aural transmission service. An engineering analysis has determined that Channel 254A can be allotted to Mabton in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3] Since Mabton is located within 320 kilometers (200 miles) of the U.S.-Canadian border, concurrence by the Canadian government has been requested.

4. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

City	Channel No. Present	Proposed
Mabton, Washington	--	254A

5. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

6. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Douglas N. Earp, Director
First Love Ministries, Inc.
Post Office Box 10
Yakima, Washington 98935
(Petitioner)

7. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

8. For further information concerning this proceeding, contact Sharon P. McDonald, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the

[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in the petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] Population figure taken from the 1990 U.S. Census.

[3] The coordinates for Channel 254A at Mabton are North Latitude 46-12-42 and West Longitude 120-00-18.

proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-25

In the Matter of

Amendment of Section 73.202(b), RM-8441
Table of Allotments,
FM Broadcast Stations.
(Cavalier, North Dakota)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Cavalier Radio ("petitioner") requesting the allotment of Channel 286C2 to Cavalier, North Dakota, as the community's first local aural service. Petitioner states that he will apply for the channel, if allotted.[1]

Technical Summary

2. Channel 286C2 can be allotted to Cavalier in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[2] Canadian concurrence in the allotment is required since Cavalier is located within 320 kilometers (200 miles) of the U.S.-Canadian border.

3. We believe the public interest would be served by proposing the allotment of Channel 286C2 to Cavalier since it could provide the community with its first local aural transmission service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Cavalier, North Dakota	--	286C2

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

T.L. Laidlaw
Cavalier Radio
Box 71
Walhalla, North Dakota 58282
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although the petitioner's request was signed, it failed to include an affidavit verifying that the statements contained in its petition were accurate to the best of its knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In the absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). The petitioner is requested to rectify this omission in its comments.

[2] The coordinates for Channel 286C2 at Cavalier are North Latitude 48-47-36 and West Longitude 97-37-12.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-24

In the Matter of

Amendment of Section 73.202(b), RM-8440
Table of Allotments,
FM Broadcast Stations.
(Bozeman, Montana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. Before the Commission for consideration is a petition for rule making filed by William R. Reier, Jr. ("petitioner"), requesting the allotment of Channel 278C1 to Bozeman, Montana, as that community's fifth FM broadcast service. Petitioner submitted information in support of the proposal and stated his intention to file an application if the channel is allotted to Bozeman.

2. We believe petitioner's proposal warrants consideration. Channel 278C1 can be allotted to Bozeman, Montana, in compliance with the minimum distance separation requirements of the Commission's Rules without a site restriction.[1]

3. We believe the public interest would be served by proposing the allotment of Channel 278C1 to Bozeman, Montana, since it would provide the community with additional reception service. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Bozeman, Montana	229C1, 236C1 260C1, *271C2	229C1, 236C1, 260C1, *271C2, 278C1

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner's counsel, as follows:

Dennis F. Begley
Reddy, Begley & Martin
1001 22nd Street, N.W., Suite 350
Washington, D.C. 20037

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. See *Certification that Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Kathleen Scheuerle, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in this proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

[1] The coordinates for Channel 278C1 at Bozeman are 45-40-47 and 111-02-16.

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-22

In the Matter of

Amendment of Section 73.202(b), RM-8438
Table of Allotments,
FM Broadcast Stations.
(Jackson, Louisiana)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission has before it the petition for rule making filed by Roosevelt Gremillion ("petitioner"), requesting the allotment of Channel 283A to Jackson, Louisiana, as the community's first local aural transmission service.[1] Petitioner states that he will apply for the channel, if allotted.

2. We believe the public interest would be served by proposing the allotment of Channel 283A to Jackson,[2] since it could provide the community with its first local FM service. Channel 283A can be allotted to Jackson in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[3]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Jackson, Louisiana	--	283A

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554. Additionally, a copy of such comments should be served on the petitioner, or its counsel or consultant, as follows:

Roosevelt Gremillion, President
Pointe Coupee Broadcasting Company, Inc.
8677 St. Joseph Street
New Roads, Louisiana 70760
(Petitioner)

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Pamela Blumenthal, Mass Media Bureau, (202)634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

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[1] Although petitioner's request indicates that the original copy of his proposal was signed by him, he failed to include an affidavit verifying that the statements contained in his petition were accurate to the best of his knowledge. Section 1.52 of the Commission's Rules requires that the original of any document filed with the Commission by a party not represented by counsel be signed and verified by the party and his/her address stated. In absence of such verification, the petition may be dismissed. Section 1.401(b) of the Commission's Rules concerning rule making proceedings places petitioners on notice that their proposal must conform with the requirements of Section 1.52 regarding subscription and verification. *See also Amendment of Sections 1.420 and 73.3584 of the Commission's Rules Concerning Abuses of the Commission's Processes*, 5 FCC Rcd 3911, 3919 n.41 (1990). Petitioner is requested to rectify this omission in his comments.

[2] According to the 1990 U.S. Census, Jackson has a population of 3,891 persons.

[3] The coordinates for Channel 283A at Jackson are North Latitude 30-50-18 and West Longitude 91-13-00.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. (*See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice*, they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. (*See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-26

In the Matter of

Amendment of Section 73.202(b),
Table of Allotments,
FM Broadcast Stations.
(Pago Pago, American Samoa)

NOTICE OF PROPOSED RULE MAKING

Adopted: March 9, 1994; Released: March 21, 1994

Comment Date: May 12, 1994
Reply Comment Date: May 27, 1994

By the Acting Chief, Allocations Branch:

1. The Commission, on its own motion, proposes to delete Channel 266C1 from Pago Pago, American Samoa. The independent nation of Western Samoa has recently assigned an FM station to operate on Channel 266 which conflicts with the American Samoa allotment.

Technical Summary

2. Channel 266C1 at Pago Pago is presently vacant and unapplied for. Although a construction permit had been issued to Radio Samoa, Ltd. for Station WVUV on October 27, 1982 (File No. BPH-820330AK), the permit was forfeited and cancelled as of May 14, 1992. In addition, no applications for this channel were received during the last filing window which was open from April 28, 1993 to June 1, 1993. However, should an interest in applying for a Class C1 channel at Pago Pago be expressed, the staff has determined that Channel 226C1 is available for allotment. Channel 226C1 can be allotted to Pago Pago in compliance with the Commission's minimum distance separation requirements without the imposition of a site restriction.[1]

3. Accordingly, we seek comments on the proposed amendment of the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, for the community listed below, to read as follows:

	Channel No.	
City	Present	Proposed
Pago Pago, American Samoa	266C1	–

4. The Commission's authority to institute rule making proceedings, showings required, cut-off procedures, and filing requirements are contained in the attached Appendix and are incorporated by reference herein. In particular, we note that a showing of continuing interest is required by paragraph 2 of the Appendix before a channel will be allotted.

5. Interested parties may file comments on or before **May 12, 1994**, and reply comments on or before **May 27, 1994**, and are advised to read the Appendix for the proper procedures. Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

6. The Commission has determined that the relevant provisions of the Regulatory Flexibility Act of 1980 do not apply to rule making proceedings to amend the FM Table of Allotments, Section 73.202(b) of the Commission's Rules. *See Certification That Sections 603 and 604 of the Regulatory Flexibility Act Do Not Apply to Rule Making to Amend Sections 73.202(b), 73.504 and 73.606(b) of the Commission's Rules*, 46 FR 11549, February 9, 1981.

7. For further information concerning this proceeding, contact Leslie K. Shapiro, Mass Media Bureau, (202) 634-6530. For purposes of this restricted notice and comment rule making proceeding, members of the public are advised that no *ex parte* presentations are permitted from the time the Commission adopts a Notice of Proposed Rule Making until the proceeding has been decided and such decision is no longer subject to reconsideration by the Commission or review by any court. An *ex parte* presentation is not prohibited if specifically requested by the Commission or staff for the clarification or adduction of evidence or resolution of issues in the proceeding. However, any new written information elicited from such a request or a summary of any new oral information shall be served by the person making the presentation upon the other parties to the proceeding unless the Commission specifically waives this service requirement. Any comment which has not been served on the petitioner constitutes an *ex parte* presentation and shall not be considered in the proceeding. Any reply comment which has not been served on the person(s) who filed the comment, to which the reply is directed, constitutes an *ex parte* presentation and shall not be considered in the proceeding.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

APPENDIX

1. Pursuant to authority found in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61 0.204(b) and 0.283 of the Commission's Rules, IT IS PROPOSED TO AMEND the FM Table of Allotments, Section 73.202(b) of the Commission's Rules and Regulations, as set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached.

[1] The coordinates for Channel 226C1 at Pago Pago are South Latitude 14-16-41 and West Longitude 170-42-09.

2. *Showings Required.* Comments are invited on the proposal(s) discussed in the *Notice of Proposed Rule Making* to which this Appendix is attached. Proponent(s) will be expected to answer whatever questions are presented in initial comments. The proponent of a proposed allotment is also expected to file comments even if it only resubmits or incorporates by reference its former pleadings. It should also restate its present intention to apply for the channel if it is allotted and, if authorized, to build a station promptly. Failure to file may lead to denial of the request.

3. *Cut-off Procedures.* The following procedures will govern the consideration of filings in this proceeding.

(a) Counterproposals advanced in this proceeding itself will be considered if advanced in initial comments, so that parties may comment on them in reply comments. They will not be considered if advanced in reply comments. *(See* Section 1.420(d) of the Commission's Rules.)

(b) With respect to petitions for rule making which conflict with the proposal(s) in this *Notice,* they will be considered as comments in the proceeding, and Public Notice to this effect will be given as long as they are filed before the date for filing initial comments herein. If they are filed later than that, they will not be considered in connection with the decision in this docket.

(c) The filing of a counterproposal may lead the Commission to allot a different channel than was requested for any of the communities involved.

4. *Comments and Reply Comments; Service.* Pursuant to applicable procedures set out in Sections 1.415 and 1.420 of the Commission's Rules and Regulations, interested parties may file comments and reply comments on or before the dates set forth in the *Notice of Proposed Rule Making* to which this Appendix is attached. All submissions by parties to this proceeding or by persons acting on behalf of such parties must be made in written comments, reply comments, or other appropriate pleadings. Comments shall be served on the petitioner by the person filing the comments. Reply comments shall be served on the person(s) who filed comments to which the reply is directed. Such comments and reply comments shall be accompanied by a certificate of service. *(See* Section 1.420(a), (b) and (c) of the Commission's Rules.) Comments should be filed with the Secretary, Federal Communications Commission, Washington, D.C. 20554.

5. *Number of Copies.* In accordance with the provisions of Section 1.420 of the Commission's Rules and Regulations, an original and four copies of all comments, reply comments, pleadings, briefs, or other documents shall be furnished the Commission.

6. *Public Inspection of Filings.* All filings made in this proceeding will be available for examination by interested parties during regular business hours in the Commission's Public Reference Room at its headquarters, 1919 M Street N.W., Washington, D.C.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

THE MONTESSORI SCHOOL OF FORT MYERS
Naples, FL — File No. BPLIF-920319DQ

FAITH LUTHERAN CHURCH
Marco Island, FL — File No. BPLIF-930219DE

For Construction Permit and License in the Instructional Television Fixed Service on Channels D1, D2, D3, and D4

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1994; Released: March 22, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of The Montessori School of Fort Myers (School) and Faith Lutheran Church (Church), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels D1-D4 in the areas of Naples and Marco Island, Florida, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. School is engaged in the formal education of enrolled students and is accredited by the Florida Kindergarten Council and the National Independent Private Schools Association. Church, a nonprofit educational organization, has submitted a statement of its educational purpose, as well as a letter of intended use from the Collier County Public Schools which is a school system engaged in the formal education of enrolled students and is accredited by the Southern Association of Colleges and Schools.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F Channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. School proposes to serve the formal educational needs of its own students, while Church intends to serve the needs of students enrolled at accredited schools in its community.

Accreditation. School is entitled to three points because it is accredited by the Florida Kindergarten Council and the National Independent Private Schools Association and intends to serve its own students. Although Church proposes to serve accredited institutions, a factor satisfying its basic eligibility, it is not an entity accredited in its own right, the status necessary for earning merit points under the accreditation criterion. Therefore, Church is not entitled to any points by this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986).

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[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

School's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational ITFS programming per channel per week. Thus, School is entitled to one programming merit point. In contrast, Church's illustrative schedule proposes averages of 30 hours of formal educational ITFS programming per channel per week and 10 hours of other ITFS programming per channel per week, while its programming grid proposes an average of 21 hours of formal educational ITFS programming per channel per week. Thus, Church is deemed to have proposed an average of 21 hours of formal educational programming per week and is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. School is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of ten points. Church is entitled to four points for being local, two points for observing the four channel limitation, and one point for proposing at least 21 hours of formal educational ITFS programming per channel per week, for a total of seven points. Thus, School is the tentative selectee.

OTHER MATTERS

5. School proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. School has submitted a copy of its lease with RuralVision South, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against School's application.

6. We find School fully qualified to be an ITFS licensee and conclude that grant of School's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Faith Lutheran Church (BPLIF-930219DE) IS DENIED, and the application of The Montessori School of Fort Myers (BPLIF-920319DQ) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

NORTHERN ARIZONA UNIVERSITY FOUNDATION
Waipahu, HI — File No. BPLIF-910524DF

HAWAII PACIFIC UNIVERSITY
Honolulu, HI — File No. BPLIF-911008ED

For Construction Permit and License
in the Instructional Television Fixed
Service on Channels D1-D4

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1994; Released: March 22, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Northern Arizona University Foundation (Northern Arizona) and Hawaii Pacific University (Hawaii Pacific) for a construction permit and license on Channels D1-D4 in the Instructional Television Fixed Service (ITFS). The applicants propose to serve Honolulu, Hawaii, and nearby areas.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a) (1)-(5). Both applicants are qualified to be ITFS licensees. Hawaii Pacific is accredited by the Western Association of Schools and Colleges and is applying to provide ITFS service to its own students. While Northern Arizona is not itself local to the Honolulu area and is not itself accredited, it has established a local programming committee and has shown that it proposes to serve students in schools accredited by the State of Hawaii and the Western Association of Schools and Colleges.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523, (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 74 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions, or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of ITFS programming.[2] Fifth, one point is awarded to applicants which are existing Channel E or F licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Hawaii Pacific is entitled to four points because it proposes to offer programming to its own students. Northern Arizona, based in Flagstaff, Arizona, seeks to serve the Honolulu area. Because its headquarters is not located within the area it proposes to serve, Northern Arizona is not entitled to points for being a local applicant.

Accreditation. Hawaii Pacific is entitled to three points because it is accredited by the Western Association of Schools and Colleges and intends to serve its own students. Although Northern Arizona proposes to serve accredited institutions, a factor satisfying its basic eligibility, it is not an accredited entity in its own right, the status necessary for earning merit points under the accreditation criterion. Therefore, Northern Arizona is not entitled to any points by this measure. See *Instructional Television Fixed Service - Second Report and Order Reconsidered in MM Docket No. 83-523*, 59 RR 2d 1355, 1370 (1986).

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in the proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in the schedule and in the grid are inconsistent, we will consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Hawaii Pacific's illustrative schedule proposes an average of 40.25 hours of formal ITFS programming per channel per week, while the grid proposes an average of 41.5 hours. Using the lower of the two averages (both of which would be permitted by the excess capacity lease), we conclude that Hawaii Pacific is entitled to one programming merit point. In contrast, Northern Arizona's illustrative schedule proposes an average of 30.5 hours of formal ITFS programming per channel per week, while the grid proposes an average of 41 hours. Again, using the lower of the two averages, we conclude that Northern Arizona is also entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Therefore, neither is entitled to the one point for such applicants.

Total. Hawaii Pacific is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming per channel, per week, for a total of ten points. Northern Arizona is entitled to two points for observing the four-channel limitation and one point for proposing at least 21 hours of formal educational programming per channel, per week, for a total of three points. Thus, the tentative selectee is Hawaii Pacific.

OTHER MATTERS

5. Hawaii Pacific proposes to lease its excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. The applicant has submitted a copy of its lease with Maui Cable Vision, which conforms in all respects with our requirements. Additionally, no petitions to deny or informal objections have been filed against Hawaii Pacific's application.

6. We find Hawaii Pacific fully qualified to be an ITFS licensee and conclude that grant of Hawaii Pacific's application would serve the public interest, convenience and necessity.

7. Accordingly, IT IS ORDERED, That the application of Northern Arizona University Foundation (BPLIF-910524DF) IS DENIED, and the application of Hawaii Pacific University (BPLIF-911008ED) IS GRANTED.

8. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

BELLS INDEPENDENT SCHOOL DISTRICT
Dennison, TX — File No. BPLIF-920211DB

SILO PUBLIC SCHOOLS
Kenefic, OK — File No. BPLIF-921123DD

PARIS INDEPENDENT SCHOOL DISTRICT
Sumner, TX — File No. BPLIF-920713DK

For Construction Permit and License
in the Instructional Television
Fixed Service on Channels C1, C2,
C3, and C4

MEMORANDUM OPINION AND ORDER

Adopted: March 4, 1994; Released: March 22, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of Bells Independent School District (Bells), Silo Public Schools (Silo), and Paris Independent School District (Paris), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels C1-C4 in the areas of Dennison, Texas, Kenefic, Oklahoma, and Sumner, Texas, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Each applicant is qualified to be an ITFS licensee. Bells and Paris are school districts accredited by the Texas Education Agency. Although they propose to serve students outside their districts, they also propose to provide some formal educational programming to schools within their own jurisdictions. Silo is a school system accredited by the Oklahoma State Department of Education and it proposes to serve students both within and outside its jurisdiction.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being local. Each is a school district or system serving the formal educational needs of schools within its jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. Bells and Paris are accredited by the Texas Education Agency. Silo is accredited by the Oklahoma State Department of Education.

Four-Channel Limitation. No applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation. Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." Where the amounts and types of programming proposed in

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

the schedule and in the grid are inconsistent, we shall consider as correct, for comparative purposes, the amount and type which result in the least number of points to the applicant, so long as the excess capacity lease permits that level of programming to be transmitted. See *Hispanic Information and Telecommunications Network, Inc.*, 7 FCC Rcd 5924 (1992).

Bells' illustrative schedule proposes an average of 15.75 hours of formal ITFS programming and 18.5 hours of other ITFS programming per channel per week, while its programming grid proposes averages of 16 hours of formal ITFS programming and 18.25 hours of other ITFS programming per channel per week. Because neither the schedule nor the grid establishes the threshold amount at which merit points are awarded, Bells is entitled to no programming merit points.

Silo's schedule proposes an average of 6.5 hours of formal ITFS programming and 6.75 hours of other ITFS programming per channel per week, while its programming grid proposes averages of 6.5 hours of formal ITFS programming and 17 hours of other ITFS programming per channel per week. Because neither the schedule nor the grid reaches the threshold amount at which merit points are awarded, Silo is also entitled to no programming merit points.

Paris' schedule proposes an average of 24.375 hours of formal ITFS programming, while its programming grid likewise proposes an average of 24.375 hours of formal ITFS programming. Thus, Paris is entitled to one programming merit point.

E- and F- Channel Group Relocation. No applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, none is entitled to the one point for such applicants.

Total. Bells and Silo are entitled to four points for being local, three points for being accredited, and two points for observing the four-channel limitation, for a total of nine points each. Paris is entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of ten points. Thus, the selectee is Paris. Furthermore, since the application filed by Bells is not mutually exclusive with that of Paris, it can be granted as well.

OTHER MATTERS

5. No determination has been made that the tower heights of three of the receive sites proposed by Paris would not constitute a hazard to air navigation. Accordingly, any grant of a construction permit/license to Paris will be appropriately conditioned.

6. Paris and Bells propose to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. Paris has submitted a copy of its lease with RuralVision South, Inc., whereas Bells has submitted a copy of its lease with Galaxy Management, Inc. Both leases conform in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against the applications of Paris and Bells.

7. We find Paris and Bells fully qualified to be ITFS licensees and conclude that grant of their applications would serve the public interest, convenience and necessity.

8. Accordingly, IT IS ORDERED, That the application of Silo Public Schools (BPLIF-921123DD) IS DENIED, and the applications of Bells Independent School District (BPLIF-920211DB) and Paris Independent School District (BPLIF-920713DK) ARE GRANTED.

9. IT IS FURTHER ORDERED, That the authorization issued to Paris Independent School District shall be conditioned as follows:

> This authorization is subject to the condition that construction of the receive towers at receive site locations R-9, R-10, and R-11 is prohibited until clearance is received from the Federal Aviation Administration, the Commission is so notified, and the appropriate painting and lighting specifications are determined.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

SAN DIEGO INDEPENDENT SCHOOL DISTRICT
Benavides, TX — File No. BPLIF-920402DA

TEXAS A&I UNIVERSITY
Falfurrias, TX — File No. BPLIL-930219DS

For Construction Permit and License
in the Instructional Television,
Fixed Service on Channels G1, G2,
G3, and G4

MEMORANDUM OPINION AND ORDER

Adopted: March 9, 1994; Released: March 22, 1994

By the Commission:

1. The Commission has before it for consideration the above-captioned mutually exclusive applications of San Diego Independent School District (San Diego) and Texas A&I University (University), each seeking a construction permit and license in the Instructional Television Fixed Service (ITFS) on Channels G1-G4 in the areas of Benavides and Falfurrias, TX, respectively.

BASIC ELIGIBILITY

2. Before applying the mutually exclusive selection procedure to determine the number of merit points to be awarded to each applicant, we must first ascertain the basic eligibility of the applicants. Educational institutions and governmental organizations that propose to serve either their own enrolled students or students at accredited schools within their respective jurisdictions establish their eligibility by accreditation from the appropriate state department of education or a recognized regional or national accrediting organization. Other ITFS applicants that propose to serve students at accredited schools outside of their respective jurisdictions must, to be eligible, submit letters of intended use from those schools and establish local program committees in those communities. See 47 C.F.R. Section 74.932(a)(1)-(5). Both applicants are qualified to be ITFS licensees. San Diego is a school district accredited by the Texas Education Agency and it proposes to serve students both within and outside its jurisdiction. University is a governmental organization engaged in the formal education of enrolled students and is accredited by the Southern Association of Colleges and Schools. University proposes to serve students on its campus and in neighboring jurisdictions.

MUTUALLY EXCLUSIVE SELECTION PROCEDURE

3. In cases of mutually exclusive ITFS applications, where applicants are competing for the same or adjacent channels in the same geographic area, each application is reviewed pursuant to our comparative process. This procedure awards a maximum of twelve merit points based on five criteria deemed to be most relevant to predicting the applicant best qualified to provide the service for which the ITFS spectrum has been allocated. *Instructional Television Fixed Service - Second Report and Order in MM Docket No. 83-523 (Second Report and Order)*, 101 FCC 2d 49, 65-72 (1985); 47 C.F.R. Section 74.913. First, four points are awarded to local applicants.[1] Second, three points are awarded to applicants which are accredited schools, educational institutions or school boards and school districts applying within their jurisdictions. Third, two points are awarded to applicants whose requests would result in the acquisition by these applicants of four or fewer ITFS channels within the particular area. Fourth, either one or two points may be awarded to applicants for specified levels of proposed ITFS programming.[2] Fifth, one point is awarded to applicants which are existing E or F channel licensees seeking to relocate on another ITFS channel group, where such applicants show an established need for an expanded service that cannot be accommodated on their grandfathered E or F facilities. The tentative selectee is the applicant with the highest score.

4. Under this comparative selection process, the applicants are awarded points based on the following criteria:

Localism. Each applicant is entitled to four points for being an educational entity that proposes to serve the formal educational needs of schools within its respective jurisdiction.

Accreditation. Each applicant is entitled to three points for accreditation. San Diego is accredited by the Texas Education Agency. University is accredited by the Southern Association of Colleges and Schools.

Four-Channel Limitation. Neither applicant is the licensee of, or has filed applications for, additional ITFS channels in its proposed service area. Therefore, each applicant is entitled to two points for remaining within the four-channel limitation.

Instructional Programming. ITFS applicants detail their formal educational and other ITFS programming proposals in both a program schedule and a program "grid." San Diego's illustrative schedule and programming grid propose an average of 24.375 hours of formal educational programming per channel per week. University's illustra-

[1] A "local" applicant is an institution or organization that is physically located in the community or metropolitan area where service is proposed. *Second Report and Order*, 101 FCC 2d at 59; 47 C.F.R. Section 74.932, Note 1.

[2] One point is awarded for a proposed weekly schedule of at least 21 average hours per channel of formal educational programming or of at least 41 average hours per channel of other ITFS programming. Two points are awarded for a proposed weekly schedule of at least 41 average hours per channel of formal educational programming or at least 61 hours per channel of ITFS programming where at least 21 of those hours are formal educational programming. 47 C.F.R. Section 74.913(b)(4).

tive schedule and programming grid propose an average of 26.125 hours of formal educational programming per channel per week. Thus, each applicant is entitled to one programming merit point.

E- and F- Channel Group Relocation. Neither applicant is the current licensee of an E or F channel seeking to relocate to other channels. Consequently, neither is entitled to the one point for such applicants.

Total. San Diego and University are entitled to four points for being local, three points for being accredited, two points for observing the four-channel limitation, and one point for proposing at least 21 hours of formal educational programming, for a total of ten points each. Because San Diego and University are tied, we must utilize our tie-breaker mechanism to determine the winning applicant.

TIE-BREAKER MECHANISM

5. When the comparative procedure results in a tie among two or more applicants, the parties are given 30 days from notification to negotiate an agreement regarding division of the use of channels. If no agreement is reached and advanced to the Commission within that time, the tentative selectee is determined through the tie-breaker mechanism detailed in *Instructional Television Fixed Service-Third Report and Order in MM Docket 83-523*, (*Third Report and Order)*, 4 FCC Rcd 4830 (1989); *Third Report and Order Reconsidered*, 5 FCC Rcd 945 (1990); and 47 C.F.R. Section 74.913(d). This mechanism is based upon the submission by each applicant of the number of students at its proposed receive sites who are formally enrolled in classes for credit toward an academic degree or diploma or a legally required certification or license.[3] Each applicant then has 15 days to respond to any aspect of the enrollment submissions. Once this response period has expired, the Commission compares the figures to determine if any applicant's system reaches less than 80 percent as many students as another applicant's. If so, the application resulting in service to the fewer number of students is denied, and the remaining application is granted. If more than one applicant remains, the channels or channel capacity are evenly divided among the remaining applicants. Because the applicants here did not reach an agreement regarding the use of the channels, we look to the enrollment figures submitted by each.

6. San Diego has submitted a letter indicating that 6,212 students will be served at its receive sites, but the necessary receive site letters from schools beyond its jurisdiction were not submitted prior to the "B" cut-off date of June 11, 1993. Consequently, San Diego can be credited only with 1,562 students, the number enrolled in the schools within its jurisdiction. University has provided documentation showing that a total of 7,255 students will be served at its receive sites. Because the number of students credited to San Diego, 1,562, is less than 80 percent of the number of students credited to University, 7,255, University will be authorized to operate facilities on Channels G1-G4 and the application of San Diego will be denied.

OTHER MATTERS

7. University proposes to lease excess capacity for non-ITFS use, as permitted by 47 C.F.R. Section 74.931. University has submitted a copy of its lease with UltraVision of Texas, Inc., which conforms in all respects with our requirements. In addition, no petitions to deny or informal objections have been filed against University's application.

8. We find University fully qualified to be an ITFS licensee and conclude that grant of University's application would serve the public interest, convenience and necessity.

9. Accordingly, IT IS ORDERED, That the application of San Diego Independent School District (BPLIF-920402DA) IS DENIED, and the application of Texas A&I University (BPLIF-930219DS) IS GRANTED.

10. IT IS FURTHER ORDERED, That the staff of the Mass Media Bureau shall send copies of this decision to the applicants by certified mail, return receipt requested.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[3] Only receive sites specified as of the "B" cut-off date may be used in determining the number of students served. *Third Report and Order Recon., supra*. Moreover, applicants serving students other than their own must have submitted letters, also by the "B" cut-off date, from those receive sites indicating an intention to use the proposed service. 47 C.F.R. Section 74.911(c); *Third Report and Order*, 4 FCC Rcd at 4832. Specifically, those letters, to be signed by the administrator or authority responsible for curriculum planning, must indicate that the applicant's programming offerings have been viewed and that such programming will be incorporated in the sites' curricula. Further, the letters should discuss the types and amounts of programming expected to be used and an indication of the extent to which representatives from the various sites will participate in the planning, scheduling, and production of the programming. 47 C.F.R. Section 74.932, Note 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER

Released: March 22, 1994

CERTIFIED MAIL-RETURN RECEIPT REQUESTED

Gannett Massachusetts Broadcasting, Inc.
Licensee, WLVI-TV
75 Morrissey Boulevard
Boston, Massachusetts 02125

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY FOR A FORFEITURE in the amount of ten thousand dollars ($10,000) pursuant to § 503(b) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by § 0.283 of the Commission's Rules, for repeated violation of the Commission's rule limiting the amount of commercial matter that may be aired during children's programming.

In response to the Children's Television Act of 1990, the Commission adopted rules and policies limiting the amount of commercial time which may be aired during children's programming to 10.5 minutes on weekends and 12 minutes on weekdays. 47 C.F.R. § 73.670. The Commission also stated that a program associated with a product, in which commercials for that product are aired, would cause the entire program to be counted as commercial time (program-length commercial). *Children's Television Programming,* 6 FCC Rcd 2111, 2118 *recon. granted in part,* 6 FCC Rcd 5093, 5098 (1991). These commercial limitations became effective on January 1, 1992.

On November 30, 1993, you filed an application for renewal of license (FCC Form 303-S) for WLVI-TV, Cambridge, Massachusetts (BRCT-931130KR). In a supplement to FCC Form 303-S you indicated that WLVI-TV had failed to comply with the limitations on commercial matter during children's programming during your last license term. In Exhibit 6 to your application you detailed the seven instances on which you exceeded the commercial limits. Four of the overages involved program-length commercials, while the other three overages were 60 seconds, 30 seconds and 28 seconds in length.

You claimed that each of the overages was an isolated instance of human error that occurred inadvertently. Moreover, you indicated that WLVI-TV carries approximately 44 hours of children's programming per week and that each quarter it carries thousands of commercials in these programs. You contended that given the large number of commercials, the number of overages is relatively small. Moreover, you stated that you have learned from your mistakes and have not had any commercial overages in the last two quarters.

Your record of exceeding the Commission's limits on commercial matter during children's programming on seven occasions, including four program-length commercials, during your license period, constitutes a willful and repeated violation of § 73.670 of the Commission's Rules. Accordingly, pursuant to § 503(b) of the Communications Act, Gannett Massachusetts Broadcasting, Inc., is hereby advised of its APPARENT LIABILITY FOR A FORFEITURE of ten thousand dollars ($10,000) for its apparent willful and repeated violation of 47 C.F.R. § 73.670. The amount specified was reached after consideration of the factors set forth in § 503(b)(2) of the Communications Act and the guidelines set forth in our *Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC,* No. 93-1526 (D.C. Cir. filed August 23, 1993).

Under these standards, $10,000 is the base forfeiture for violation of our children's television commercialization limits. The four program-length commercials and three other commercial overages clearly indicate that WLVI-TV did not establish an effective program to monitor compliance with the Commission's commercial limits. When the Commission delayed the effective date of 47 C.F.R. § 73.670 until January 1, 1992, we stated that "giving the additional time to broadcasters and cable operators before compliance with the commercial limits is required will have the effect of enabling broadcasters and cable operators to hone their plans to ensure compliance [and], in the context of any enforcement action for violations of the limits, we would be unlikely to be sympathetic to claims of difficulties." *Children's Television Programming,* 6 FCC Rcd at 5530 n.10. You have not proffered any extraordinary transitional or other difficulties that prevented WLVI-TV from complying with the commercial limits during your license period. Instead, the violations appear to result from the failure to implement adequate review procedures. Under these circumstances no upward or downward adjustment to the base forfeiture amount is warranted.

Notwithstanding this action, we find you qualified to remain a Commission licensee and conclude that grant of your application for renewal of license for Station WLVI-TV would serve the public interest. Therefore, your application, BRCT-931130KR, IS HEREBY GRANTED.

With respect to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of § 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 22, 1994

IN THE MATTER OF ALLTEL SERVICE CORPORATION, PETITION FOR WAIVER OF DEFINITION OF "STUDY AREA" CONTAINED IN PART 36, SUBPART H, APPENDIX-GLOSSARY OF THE COMMISSION'S RULES AAD 94-30

Comments: April 22, 1994
Reply Comments: May 13, 1994

On February 28, 1994, ALLTEL Service Corporation, on behalf of its telephone operating affiliates, ALLTEL Arkansas, Inc. and Perco Telephone Company, filed a petition for waiver of the definition of "study area" as set forth in Part 36, Subpart H, Appendix-glossary of the Commission's Rules. This waiver would allow the consolidation of Perco Telephone Company's study area with that of ALLTEL-Arkansas' study area in conjunction with the merger of the two companies.

Parties may file comments on this petition no later than **April 22, 1994**. Replies should be filed by **May 13, 1994**. Comments should reference AAD 94-30. An original and four(4) copies of each pleading should be sent to the Federal Communications Commission, Secretary, Room 222, 1919 M Street, N.W., Washington, D.C. 20554. Four (4) copies of each pleading should also be sent to Adrian Wright, Common Carrier Bureau, 2000 L Street, N.W., Room 812, Washington, D.C. 20554, and to International Transcription Service (ITS), 2100 M Street, N.W., Suite 140, Washington, D.C., 20037, (202) 857-3800. Copies are available for inspection and copying in the Accounting and Audits Division's public reference room, 2000 L Street, N.W., room 812, Washington D.C. Copies are also available from (ITS).

For further information contact Adrian Wright at (202) 634-1861.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Application of

ENTERTAINMENT COMMUNICATIONS, INC.
Station WYUU(FM) [formerly WXCR]
Safety Harbor, Florida

File No. BLH-880922KB

For License to Cover
Construction Permit

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1994; Released: March 22, 1994

By the Commission:

1. The Commission has under consideration an application for review[1] filed on September 13, 1989 by John W. Tyrone, *Pro Se* ("Tyrone"). Tyrone requests review of the action of the Mass Media Bureau ("Bureau") denying his informal objection and granting the above-captioned application for license filed by Entertainment Communications, Inc. ("WYUU"), permittee of FM Station WYUU, Safety Harbor, Florida.[2] *See Letter from Chief, Audio Services Division to Entertainment Communications, Inc. (Ref. 8920-JD)*, dated August 24, 1989. WYUU filed an Opposition on October 27, 1989. We deny the application for review for the reasons set forth below.

BACKGROUND

2. On September 22, 1988, WYUU filed a license application to cover its construction permit to upgrade its facilities from a Class A to C2. Shortly before that, on September 17, 1988, Tyrone had filed an informal objection, contending that the WYUU transmitter caused FM blanketing interference to Tyrone's household electronic equipment and exposed persons at his residence to excessive levels of radiofrequency ("RF") radiation. By letter to the Commission, dated May 5, 1989, WYUU submitted a detailed report of the steps it had taken to address Tyrone's concerns.[3] In the August 24, 1989 letter, the Bureau denied Tyrone's informal objection and granted the WYUU license application after finding that "all the interference complaints for which [WYUU is] responsible have been resolved" and that "the [WYUU] facilities are in full accord with the applicable limits on human exposure to radiofrequency radiation."

3. In his application for review, Tyrone states that the problems with WYUU have not been resolved and that he is "extremely disturbed" that the Bureau ruled on his objection "without verifying if in fact the problems [WYUU] created had been rectified." Acknowledging that representatives from WYUU have on more than one occasion contacted Tyrone in an attempt to resolve the FM blanketing interference and RF radiation exposure complaint, Tyrone states that he has "been unable to arrange access to [his] home for their repair men." Notwithstanding, Tyrone maintains that he "had to replace a recently purchased remote control TV with a manual model due to uncontrollable channel switching . . . . [b]ecause of the extremely high level of [RF] radiation." He also states that he is "still concerned with the potential health hazard of long term exposure to the antenna's RF radiation." In this regard, Tyrone "estimates that [WYUU's] own test[s] show radiation exposures on my property *exceed* the NCRP limit by a factor of *48* times and the ANSI limit by a factor of *38.4* times" (emphases in original). Finally, Tyrone requests, in the event of an unfavorable ruling on his application for review, the following:

> (i) that a test be conducted by an independent, qualified company to monitor current and future RF radiation levels to which his property and family are exposed, with a copy of the test results made available to him;

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[1] Although this pleading requested review by the full Commission, the pleading was mis-styled as a petition for reconsideration. The Bureau informed the parties that the Tyrone petition would be treated as an application for review pursuant to 47 C.F.R. § 1.115. *See Letter from Chief, Audio Services Division to John W. Tyrone (Ref. 8920-MW)*, dated October 3, 1989.

[2] On December 23, 1992, pursuant to prior Commission approval (File No. BALH-921204HP), the license for WYUU was assigned *pro forma* to ECI License Company, L.P.

[3] WYUU reported that, on September 16, 1988, WYUU's Station Manager, Tom Shealy, attempted to call upon Tyrone at his residence and, finding that Tyrone was not at home, left a letter for Tyrone. Thereafter, Tyrone contacted WYUU and WYUU began investigating Tyrone's complaints. His primary complaints were the proximity of the tower to his residence and RF radiation exposure. WYUU engaged an independent engineering consultant to measure the RF radiation levels in Tyrone's home. The study concluded that the RF radiation levels were within permissible limits and were not hazardous. WYUU forwarded a copy of the study report to Tyrone and to Mr. Daubar of the FCC Tampa Field Office, who performed an on-site investigation at Tyrone's residence on April 12, 1989. In addition, Tyrone complained of interference to his VCR. Investigation determined that the problem with the VCR was in a servo-motor and not in the RF portion of the VCR. Nevertheless, WYUU replaced Tyrone's VCR with a new Panasonic VCR. Tyrone also complained of interference to his cordless phone. Upon investigation, WYUU found that Tyrone had an old, inexpensive, poorly shielded phone with a broken circuit board and a broken antenna. Nonetheless, WYUU purchased a new AT&T cordless phone for Tyrone. WYUU also modified a speaker wire on Tyrone's stereo system. In mid-October 1988, Tyrone instructed WYUU not to return to complete any further investigation or work at his property. On October 21, 1988, WYUU wrote to Tyrone expressing its desire and willingness to return to complete its investigation and to remedy any remaining RF radiation problems caused by WYUU. Tyrone instructed WYUU that he did not wish WYUU to return. WYUU made follow-up calls to Tyrone on November 30, 1988 and December 9, 1988 to confirm WYUU's commitment to resolve any complaints he may have regarding RF interference caused by WYUU. Tyrone indicated that he would think about the matter and would inform WYUU if and when he wanted WYUU to return. WYUU has had no further communication from Tyrone.

(ii) that WYUU be required to correct all current and future RF problems as household items are replaced or new items added; and

(iii) that WYUU be required to defend his property against any lawsuit arising under the Florida Real Estate Disclosure Law which may hold him liable to any purchaser of his property for deficiencies resulting from the proximity of WYUU's antenna.

4. In its opposition, WYUU states that "the single instance noted by Mr. Tyrone as evidence of continuing [FM blanketing interference] experienced by him . . . – that the remote control of a television receiver would not function properly – could not be caused by RF radiation." WYUU adds that "in no instance has there been any reading measured on Mr. Tyrone's property, whether repeatable or momentary, which approaches the applicable ANSI limit [for exposure of humans to RF radiation]."

DISCUSSION

5. The technical term applied to electrical interference caused by the RF signal from an FM transmitting antenna to FM and TV receivers located within the 115 dBu contour of the antenna is "FM blanketing interference." *See FM Stations (Blanketing Interference)*, 57 RR 2d 126, 126 (1984); *Calvary Educational Broadcasting Network, Inc.*, 7 FCC Rcd 4037, 4037 n.3 (1992). The responsibility of a licensee to correct FM blanketing interference is set forth in 47 C.F.R. § 73.318. In pertinent part, Section 73.318(b) provides that:

> [L]icensees who . . . request facilities modifications and are issued a new construction permit must satisfy all complaints of blanketing interference which are received by the station during a one year period. The period begins with the commencement of program tests, or commencement of programming utilizing the new antenna. Resolution of complaints shall be at no cost to the complainant. These requirements specifically do not include interference complaints resulting from malfunctioning or mistuned receivers. . .

6. In the application for review, the only support that Tyrone offers for his contention that his interference concerns are "unresolved" is that he "had to replace a recently purchased remote control T.V. with a manual model due to uncontrollable channel switching." We agree with WYUU that this malfunction is not evidence of FM blanketing interference since wireless remote control devices utilize infrared frequencies to transmit switching information. The infrared band is located between 300 gigahertz to 500 terahertz, and is far removed from WYUU, which operates on 92.5 megahertz. We are not aware of any mechanism by which WYUU could technically be the cause of the alleged interference to the infrared remote control. As to future interference problems which may arise as household items are replaced or new items added, Section 73.318(b) limits WYUU's financial obligation to solve such problems to the one year period beginning with the commencement of program tests from the modified facilities. After the one year period, which in this case expired in September 1989, licensees are legally responsible only for providing technical information or assistance to complainants on remedies for blanketing interference. Hence, we find no basis for Tyrone's contentions and proposed conditions on the WYUU license regarding present or potential blanketing interference.[4]

7. We also find no basis for Tyrone's claim of exposure to excessive levels of RF radiation. The record indicates that WYUU hired the Chief Operator for Station WUSA, Tampa, Florida, to take RF radiation measurements on Tyrone's property and that such measurements were taken on September 26, 1988. The Commission's technical staff has reviewed the study and data submitted by WYUU and has determined that they are consistent with the results obtained by employing the prediction model and calculations described in one of the Commission's technical bulletins (OST Bulletin No. 65, October 1985). The results of WYUU's study indicate that the RF radiation level on Tyrone's property is below the threshold level recommended by the American National Standards Institute ("ANSI"). The ANSI recommendations have been adopted by the Commission for use in evaluating human exposure to RF radiation. *See* 47 C.F.R. § 1.1307(b). Further, the Bureau's study based on its theoretical application of OST Bulletin No. 65 confirms this result.[5] Thus, we can find no validity to Tyrone's claim.[6] [7]

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[4] We note that complainants are expected to cooperate reasonably with the station in resolving FM blanketing interference. In view of our conclusion that Tyrone has not shown any continuing FM blanketing interference, we need not decide whether his apparent decision to deny WYUU personnel further access to his premises, *see supra* note 3, was unreasonable and, thus, excused WYUU from any further obligation to cure his reception problem.

[5] As specifically cited in its August 24, 1989 letter, the Bureau's study revealed that, given the authorized operating parameters for WYUU, the amount of RF radiation at the base of the WYUU tower is only 16.6% of the ANSI limit. This amount decreases as the distance from the tower increases (and as the distance to Tyrone's property decreases). The highest measured repeatable reading both inside and outside of Tyrone's residence was 16% of the ANSI standard. Though there was a single isolated reading of 53% of the ANSI standard obtained on the ceiling of the master bedroom directly in front of the bathroom door, and a similar isolated reading outside near the fence, these readings were unrepeatable and, in any event, are below the ANSI standard. Moreover, Tyrone has not explained how he computed his contrary estimate, which he states is based on WYUU's report, that the RF radiation measurements on his property reached 38.4 times the ANSI standard, and the Bureau has not been able to verify this result through technically accepted means.

[6] The more restrictive standards of The National Council on Radiation Protection and Measurements ("NCRP") cited by Tyrone are not used by the FCC for purposes of environmental evaluation, and, even if they were, the readings that appeared to be in excess of NCRP guidelines were extremely localized and would not be considered indicative of ambient exposure.

[7] We thus find no basis to impose Tyrone's proposed conditions on the WYUU license regarding RF radiation exposure. As to Tyrone's apparent contention that the value of his property may be diminished because of its proximity to the WYUU tower, this is a matter outside the Commission's jurisdiction.

8. ACCORDINGLY, IT IS ORDERED, That the application for review filed by John W. Tyrone IS HEREBY DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ST. THOMAS & SAN JUAN TELEPHONE CO. File No. I-T-C-94-023

Application for authority to acquire facilities for service between the U.S. and Jamaica, Venezuela, Colombia, the Bahamas, and Aruba.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 10, 1994; Released: March 23, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of direct service between the U.S. and Jamaica, Venezuela, Colombia the Bahamas and Aruba by St. Thomas & San Juan Telephone Co. (STSJ).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-023 IS GRANTED and STSJ is authorized to:

a. (1) lease and operate satellite circuits between an earth station in the Dominican Republic and an appropriate INTELSAT satellite over the Atlantic Ocean connecting with matching facilities furnished by STSJ's correspondent in Jamaica; (2) acquire on an Indefeasible Right of User (IRU) basis a one-half interest in and operate circuits in the TCS-1 cable between the Dominican Republic and Jamaica; (3) lease a one-half interest in and operate any necessary overseas connecting facilities; and (4) use these facilities in conjunction with previously authorized facilities between the St. Thomas-Puerto Rico area and the Dominican Republic, to provide a total of 30 voice-grade circuits for STSJ's regularly authorized services between the U.S. and Jamaica;

b. (1) acquire on an IRU basis a one-half interest in and operate 30 voice-grade circuits between Tortola and Venezuela via the Digital Eastern Caribbean Microwave System (DECMS); and (2) use these facilities, in conjunction with previously authorized facilities between the St. Thomas-Puerto Rico area and Tortola, British Virgin Islands to provide STSJ's regularly authorized services between the U.S. and Venezuela;

c. (1) lease and operate satellite circuits between an earth station in the Dominican Republic and an appropriate INTELSAT satellite over the Atlantic Ocean connecting with matching facilities furnished by STSJ's correspondent in Colombia; (2) acquire on an IRU basis a one-half interest in and operate circuits in the TCS-1 cable between the Dominican Republic and Colombia; (3) lease a one-half interest in and operate any necessary overseas connecting facilities; (4) use said facilities, in conjunction with previously authorized facilities between the St. Thomas-Puerto Rico area and the Dominican Republic, to provide a total of 30 voice-grade circuits for STSJ's regularly authorized services between the U.S. and Colombia;

d. (1) acquire on an IRU basis a one-half interest in and operate 30 voice-grade circuits in the Florida-Bahamas cable; and (2) use said facilities, in conjunction with previously authorized facilities between the St. Thomas-Puerto Rico area and the Florida terminal of the Florida-Bahamas cable, to provide STSJ's regularly authorized services between the U.S. and the Bahamas; and

e. use previously authorized facilities to a theoretical mid-point connection with the DECMS from Tortola, British Virgin Islands to St. Martin for interconnection with microwave facilities of Lands Radio to Aruba on an IRU basis for the provision of its regularly authorized services between the U.S. and Aruba.

3. IT IS FURTHER ORDERED that our authorization of STSJ to provide private lines as part of its regularly authorized services is limited to the provision of such private lines only between the United States and Jamaica, Venezuela, Colombia, the Bahamas or Aruba -- that is, private lines which originate in the United States and terminate in Jamaica, Venezuela, Colombia, the Bahamas or Aruba or which originate in Jamaica, Venezuela, Colombia, the Bahamas or Aruba and terminate in the United States. In addition, STSJ may not -- and STSJ's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or Jamaica, Venezuela, Colombia, the Bahamas or Aruba end, or both, for the provision of international basic telecommunications services, including switched voice services, unless authorized to do so by the Commission upon a finding that Jamaica, Venezuela, Colombia, the Bahamas or Aruba affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates, Phase II, First Report and Order*, 7 FCC Rcd 559 (1991) *petitions for reconsideration pending.*

4. IT IS FURTHER ORDERED that neither STSJ nor any persons or companies directly or indirectly controlling or controlled by STSJ, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which STSJ or any persons or companies controlling or controlled by STSJ are parties.

5. IT IS FURTHER ORDERED that STSJ shall file a copy of any operating agreement it enters into with its foreign correspondents with the Commission within 30 days of its execution, and shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules, 47 C.F.R. §43.51.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. Section 63.15(b).

9. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

10. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ASSOCIATED COMMUNICATIONS OF LOS ANGELES, INC. File No. I-T-C-94-047

Application for authority to acquire and operate INTELSAT facilities for the provision of IBS, International Television Switched and private line services between the U.S. and various overseas points.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 7, 1994; Released: March 23, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require a grant thereof.

2. Accordingly, IT IS ORDERED that application File No. I-T-C-94-047 IS GRANTED, and Associated Communications of Los Angeles, Inc. (ACLA) is authorized to:

a. lease from Comsat and operate a total of 510 voice-grade satellite half-circuits: 410 voice-grade half-circuits between an appropriately licensed earth station on the east coast of North America and an appropriate satellite over the Atlantic Ocean and 100 voice-grade half-circuits between an appropriately licensed earth station on the west coast of the United States mainland and an appropriate satellite over the Pacific Ocean;

b. lease and operate 410 64-Kbps circuits in the appropriatly licensed east coast earth station and 100 voice-grade circuits in the appropriately licensed west coast earth station in the U.S. mainland;

c. lease and operate domestic connecting facilities;

d. use the said facilities in a. b and c above to provide international switched and private line services between the U.S. and the points listed in the Appendix hereto; and

e. lease from Comsat channels of communications between appropriately licensed U.S. earth stations and INTELSAT Atlantic and Pacific Ocean Region satellites for the provision of IBS and associated digital video services and international television service between the U.S. mainland and those countries which are now or hereafter will be listed in Comsat's tariff provisions for the space segment component of IBS and/or television services.

3. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of operating agreements between ACLA and its correspondents, and a copy of the agreements shall be filed with the Commission within 30 days of its execution; and ACLA shall otherwise comply with the filing requirements contained in Section 43.51 of the Commission's Rules 47 C.F.R. §43.51, and in *Regulation of International Accounting Rates*, Phas II, First Report and Order, 57 Fed. Reg. 646 (1992) (to be codified at 47 C.F.R. §43.51(a)(3)).

4. IT IS FURTHER ORDERED that our authorization of ACLA to provide private lines is limited to the provision of such private lines only between the United States and those countries listed in Comsat's IBS tariff or in the Appendix hereto -- that is, private lines which originate in the United States and terminate in those countries listed in Comsat's IBS tariff or in the Appendix hereto or which originate in those countries listed in Comsat's IBS tariff or in the Appendix hereto and terminate in the United States. In addition, ACLA may not -- and ACLA's tariff must state that its customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or those countries listed in Comsat's IBS tariff or in the Appendix hereto end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that those countries listed in Comsat's IBS tariff or in the Appendix hereto afford resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and Order on Reconsideration and Third Further Notice of Proposed Rulemaking, 7 FCC Rcd 7927 (1992).

5. IT IS FURTHER ORDERED that neither ACLA nor any persons or companies directly or indirectly controlling or controlled by ACLA, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which ACLA or any persons or companies controlling or controlled by ACLA are parties.

6. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the services authorized in this Order.

7. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules. 47 C.F.R. §43.61.

8. IT IS FURTHER ORDERED that the applicant shall file the circuit addition reports required by Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b) for any additional circuits acquired.

9. IT IS FURTHER ORDERED that nothing in this authorization should be construed to include authorization for the transmission of money in connection with the services the applicant seeks authority to provide. The transmission of money is not considered to be a common carrier service. Therefore, nothing in this Order should be construed as containing authority for the transmission of money.

10. This Section 214 authorization is without commitment as to the Commission's action on any Title III application that ACLA may file in the future.

11. This order is issued under Section 0.291 of the Commission's Rules and is effective upon release. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

APPENDIX

Switched and Private Line Services

Country	# of 64 Kbps Circuits
Argentina	10
Austria	10
Bahamas	10
Belgium	10
Brazil	10
Canada	10
Chile	10
Colombia	10
Costa Rica	10
Denmark	10
Dominican Republic	10
Ecuador	10
Egypt	10
El Salvador	10
Finland	10
France	10
Germany, Federal Republic of	10
Greece	10
Guatemala	10
Ireland	10
Israel	10
Italy	10
Jamaica	10
Mexico	10
Netherland Antilles	10
Nicaragua	10
Norway	10
Panama	10
Poland	10
Portugal	10
Saudi Arabia	10
Spain	10
Spain (Canary Islands)	10
Sweden	10
Switzerland	10
Turkey	10
United Arab Emirates	10
United Kingdom	10
Uruguay	10
Venezuela	10
Yugoslavia	10
Australia	10
Hong Kong	10
Indonesia	10
Japan	10
Korea, Republic of	10
Malaysia	10
Micronesia	10
People's Republic of China	10
Taiwan	10
Vietnam	10

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 94-20

In re Application of

Family Broadcasting, Inc. File No. BPH-910924MB

For Construction Permit
for a New FM Station on Channel
229A in Hague, New York

HEARING DESIGNATION ORDER

Adopted: March 4, 1994; Released: March 23, 1994

By the Chief, Audio Services Division:

1. The Commission, by the Chief, Audio Services Division, acting pursuant to delegated authority, has under consideration the above application of Family Broadcasting, Inc. ("Family"), Hague, New York, for a construction permit (File No. BPH-910924MB) for a new FM broadcast station to operate on Channel 229A1 at 93.7 mHz in Hague, New York.

2. *Preliminary matters.* Family lists as holder of 10% of its stock an organization called "Canaan Foundation." Because the Canaan Foundation is a "party" to Family's application under the Commission's attribution rules, *see* 47 C.F.R. §73.3555 note 2(a), the names of its principals must be supplied. Family has not done so. Accordingly, it will be required to submit that information to the presiding Administrative Law Judge within 30 days of the release of this Order.

3. An engineering study of Family's application, as originally filed, indicates that it proposes to sidemount its antenna on an existing tower used by WANC(FM), Ticonderoga, New York. Our study reveals that Family did not sufficiently address the issue of potential occupational hazards caused by the proposed facilities. Pursuant to OST Bulletin No. 65, October 1985, entitled "Evaluating Compliance with FCC-Specified Guidelines for Human Exposure to Radiofrequency Radiation," when persons have access to the site, the transmitter power must be reduced or completely eliminated in order to comply with FCC guidelines. In situations such as Family's, where there are multiple contributors to radiofrequency radiation, all stations are required to reduce power or cease operations as necessary to assure safety with respect to radiofrequency radiation for persons having access to the site. Accordingly, any subsequent grant will be subject to an appropriate condition.

4. Family filed an amendment to its application on January 27, 1992, after the last date for filing amendments as of right. The amendment purported to change the name of the applicant (from "Harvest Broadcasting, Inc. d/b/a Family Broadcasting, Inc." to "Family Broadcasting, Inc."), specify a new transmitter site (with concomitant engineering changes) and specify a new contact for its certification of site availability. The amendment was unaccompanied by the showing of "good cause" required by 47 C.F.R. §73.3522(a)(6), and therefore the transmitter site and site availability certification portions of the amendment must be returned. However, pursuant to 47 C.F.R. §1.65, that portion of the amendment containing the applicant's name change will be accepted.

5. *Site Availability.* Family certified in question 2, Section VII of FCC Form 301 of the above referenced application that it had reasonable assurance, in good faith, that a site which it designated on the application as the "summit of Mount Defiance, Ticonderoga, N.Y," would be available for use as an antenna site. Family further certified that such reasonable assurance was not based on its ownership of the proposed site, but had been obtained by contacting Nick Westbrook, (518) 585-2821, identified as the owner's agent. This site is owned by the Fort Ticonderoga Association ("Fort Ticonderoga"). Nicholas Westbrook is the Director of Fort Ticonderoga. On November 14, 1991, Westbrook, on behalf of Fort Ticonderoga, sent a letter to Alexander McEwing, the President of Family, in which he states that he was "disturbed" to read a legal notice posted by Family in "The Times of Ti," a local newspaper, "declaring Family's intention to seek approval from the FCC for an FM broadcast facility based on Mt. Defiance." The letter further states that "neither (McEwing), nor Family Broadcasting, nor any other related entity have approval to do so" from Fort Ticonderoga. Westbrook also refers to a telephone conversation between himself and McEwing which took place in "early September." According to Westbrook, McEwing "inquired about lease possibilities", but Westbrook "stated clearly that we would consider written proposals only, detailing technical and financial implications." The letter concludes by stating that "reasonable assurance of lease of appropriate broadcast facilities on top of Mount Defiance... has not been offered or implied -- and will not be."

6. On January 23, 1992, the Commission received a letter from Westbrook in which he indicates that Fort Ticonderoga had "no intention of leasing tower access" to Family and that "there was no basis whatsoever" for Family's representation of reasonable assurance of site availability. Included with this letter was a copy of the above referenced November 14, 1991 letter to McEwing. On May 24, 1993, the Commission sent a letter of inquiry to Joseph E. Dunne, counsel for Family, requesting a response to Westbrook's filing, which will be treated here as an informal objection to Family's application. In the June 1, 1993 response, McEwing asserts that he called Westbrook on September 18, 1993 to "check to see" if the site was available. McEwing further states that Westbrook informed him that Fort Ticonderoga "needed a formal proposal," including the tax status of Family, the rent Family proposed to pay, the time frame in which Family anticipated the station would be built, how much room Family would require in the pre-existing building on the site, and how much electricity the station would use. However, McEwing states that in the September telephone conversation, he also explained to Westbrook that the application process was lengthy and thus the site would not be needed for 18 months to three years, and that Family was "under some time constraints to get the application on file." He further explained that "all the FCC required to allow an applicant to file an application was reasonable assurance that the site would be available," and that "reasonable assurance required that he had a site available and that he would be

willing to rent the site" to Family. McEwing states that he then asked Westbrook whether he had "any objections to (Family) filing an application on the Mt. Defiance site," and Westbrook "expressed no objection, but said that he had a board meeting coming up soon, and that he would like a letter to present to the board." According to McEwing, the entire conversation took "a little over 10 minutes" and was "friendly." McEwing states that it was his belief, following the phone conversation, that Fort Ticonderoga would not object to Family specifying the site in its application, and that he would have to get a formal proposal to Westbrook to "begin the negotiation process." Apparently, the next correspondence McEwing had with Fort Ticonderoga was the November 14 letter.

7. Informal objections must, pursuant to Section 309(e) of the Communications Act of 1934, as amended, provide properly supported allegations of fact that, if true, would establish a substantial and material question of fact that the grant of the application would be inconsistent with the public interest. *WWOR-TV, Inc.*, 6 FCC Rcd 193, 197 n.10 (1990). Thus, in the present case, the facts alleged by Fort Ticonderoga must raise a substantial and material question of fact regarding whether or not Family had reasonable assurance that its specified site was available at the time it so certified in the Hague application.

8. Under Commission precedent, reasonable assurance of site availability requires, at a minimum, a meeting of the minds resulting in some firm understanding as to the availability of the site for the intended use. *Genesee Communications, Inc.* 3 FCC Rcd 3595 (Rev. Bd. 1988). A subjective belief by the applicant does not meet the reasonable assurance standard. *Id.* at 1636. Moreover, the fact that a property owner has indicated that he will discuss the possibility of a lease at a future date does not, absent some indication that he is favorably disposed toward making such an arrangement, provide any more assurance than an unrejected offer. *El Camino Broadcasting Corp.*, 12 FCC 2d 25, 26 (Rev. Bd. 1968). While an applicant need not demonstrate absolute assurance, such as a binding contract, a mere possibility that the site will be available is not sufficient. *William F. Wallace and Anne K. Wallace*, 49 FCC 2d 1424 (Rev. Bd. 1974), *Rosemor Broadcasting Co., Inc.*, 45 FCC 2d 920, 29 RR 2d 1113 (Rev. Bd., 1974).

9. In the present case, we are unable to find that Family had reasonable assurance that the Mount Defiance site was available for its use at the time of certification. Whether Family had reasonable assurance that a site was available depends on whose version of the telephone conversation between McEwing and Westbrook one believes. Under Family's account, Westbrook did not actually make an offer to lease the site, but he did not object to Family's designation of the site on its application. Thus, under Family's account, there was not a binding agreement between the parties, but arguably there was more than a mere possibility that the site would be available. Under Fort Ticonderoga's account, there was no meeting of the minds between the parties; Westbrook could consider only written proposals, and therefore there was only an indeterminate chance that Family might obtain a lease for the site sometime in the future. Thus, the totality of the evidence raises sufficient doubt as to whether Family had reasonable assurance of its specified site at the time of certification that a substantial and material question of fact exists on this point calling for further inquiry. *Columbus Broadcasting Coalition*, 505 F.2d 320, 330 (D.C. Cir. 1974); *Broadcast Enterprise v. FCC*, 310 F.2d 483, 485 (D.C. Cir. 1968).

10. Accordingly, IT IS ORDERED, That, pursuant to Section 309(e) of the Communications Act of 1934, as amended, the application of Family Broadcasting, Inc. IS DESIGNATED FOR HEARING IN A PROCEEDING to be held before an Administrative Law Judge at a time and place to be specified in a subsequent Order, upon the following issues.

1. To determine, with respect to Family Broadcasting, Inc.:

(a) whether the applicant, at the time it so certified, had reasonable assurance that its proposed site would be available to it;

(b) whether, in light of the evidence adduced pursuant to the foregoing issue, the applicant misrepresented to the Commission the availability of its specified site; and

(c) if issue 1(b) above is resolved in the affirmative, the effect thereof on the applicant's qualifications to be a Commission licensee.

11. IT IS FURTHER ORDERED, That Family shall file an amendment containing the pertinent ownership information regarding the principals of Canaan Foundation with the presiding Administrative Law Judge within 30 days of the release of this Order.

12. IT IS FURTHER ORDERED, That, grant of a permit to Family shall be subject to the following condition:

The permittee/licensee, in coordination with other users of the site, must reduce power or cease operations as necessary to protect persons having access to the site, tower or antenna from radio frequency radiation in excess of FCC guidelines.

13. IT IS FURTHER ORDERED, That the amendment filed on January 27, 1992 IS ACCEPTED in part and IS RETURNED in part.

14. IT IS FURTHER ORDERED, That a copy of each document filed in this proceeding subsequent to the date of the adoption of this Order shall be served on the counsel of record in the Hearing Branch appearing on behalf of the Chief, Mass Media Bureau. Parties may inquire as to the identity of the counsel of record by calling the Hearing Branch at (202) 632-6402. Such service shall be addressed to the named counsel of record, Hearing Branch, Enforcement Division, Mass Media Bureau, Federal Communications Commission, 2025 M Street, N.W., Suite 7212, Washington, D.C. 20554. Additionally, a copy of each amendment filed in this proceeding subsequent to the date of adoption of this Order shall be served on the Chief, Data Management Staff, Audio Services Division, Mass Media Bureau, Federal Communications Commission, Room 350, 1919 M Street, N.W., Washington D.C. 20554.

15. IT IS FURTHER ORDERED, That, to avail itself of the opportunity to be heard, the applicant shall, pursuant to Section 1.221 (c) of the Commission's Rules, in person or by attorney within 20 days of the mailing of this Order, file with the Commission, in triplicate, a written appearance stating an intention to appear on the date fixed for hearing and to present evidence on the issue specified in this Order.

16. IT IS FURTHER ORDERED, That the applicant shall, pursuant to Section 311(a) (2) of the Communications Act of 1934, as amended, and Section 73.3594 of the Commission's Rules, give notice of the hearing within the time and in the manner prescribed in such Rule, and shall advise the Commission of the publication of such notice as required by Section 73.3594(g) of the Rules.

FEDERAL COMMUNICATIONS COMMISSION

Linda B. Blair, Assistant Chief
Audio Services Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Loretel Systems, Inc. AAD 93-132
and
Loretel Systems South, Inc.

Petition for Waiver of the
Definition of "Study Area"
contained in Part 36, Appendix-
Glossary, of the Commission's Rules

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1994; Released: March 23, 1994

By the Deputy Chief (Operations), Common Carrier Bureau:

1. On October 27, 1993, Loretel Systems, Inc. (Loretel), on behalf of its telephone affiliate Loretel Systems South, Inc. (Loretel South) filed a petition for waiver of the definition of "study area" to consolidate both companies as one operating entity. We placed this petition on public notice November 23, 1993, and received comments in support of the request from one party,[1] the National Exchange Carrier Association.

I. STUDY AREA WAIVER

2. A study area is a geographical segment of a carrier's telephone operation. Generally a study area represents a carrier's entire operation within a state. Thus, carriers that operate in more than one state typically have one study area for each state, and carriers that operate in a single state have a single study area. A carrier performs its jurisdictional separations at the study area level. For jurisdictional separations purposes, the Commission froze study area boundaries effective November 15, 1984.[2] Carriers wishing to change their study area boundaries can request a waiver of the applicable rule.[3] There are three primary concerns in study area boundary change petitions: first, that the change not adversely affect the universal service fund (USF) support program;[4] second, that the state commission(s) having regulatory authority have no objection to the change;[5] and finally, that there is strong public interest support for a waiver.

Petition

3. The service area here, consisting of four exchanges, is being merged with its parent company, Loretel. These four exchanges are located predominately in a rural area of northern Minnesota. They serve approximately 6,000 access lines. Loretel seeks a waiver to consolidate the four exchanges into its existing study area. Loretel states that neither company receives any Universal Service Fund ("USF") support, and the combined company study area will not be eligible for USF payment. Loretel states that the merger will promote the public interest through more cost effective service flowing from improved operating efficiencies in the areas of maintenance and ongoing administration.[6]

Discussion

4. We have considered Loretel's arguments and concluded that Loretel should be allowed to reconfigure its study area boundaries to reflect the merger of Loretel South.

5. In this case, none of the study areas currently receives any USF support and the newly combined study area will not be eligible for USF payment. Consequently, the merger will have no adverse affect on the USF. Although no supplemental document was submitted with Loretel's petition to demonstrate that approval was given by the state commission, Loretel states in the petition that permission was granted by the Minnesota Public Utilities Commission ("Minnesota PUC") in June 1993.[7] NECA supports the petition and urges us to grant it expeditiously. Moreover, the Minnesota PUC did not oppose the waiver request. We believe, therefore, that the Minnesota PUC has had sufficient opportunity to lodge any objections that it may have to the Loretel request. In view of the foregoing, we find that this merger does not conflict with the intent of the Commission in freezing study area boundaries. In addition, Loretel has made an adequate showing that the merger will promote the public interest through more cost effective service from improved maintenance and ongoing administration.

II. ORDERING CLAUSE

6. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 5(c) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(i) and 155(c) and §§ 0.91 and 0.291 of the Commission's Rules, 47 C.F.R. §§ 0.91 and 0.291, that the Petition of Loretel Systems, Inc., on behalf

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[1] Public Notice DA 93-1427, released November 23, 1993.

[2] *See* MTS and WATS Market Structure, Amendment of Part 67 of the Commission's Rules and Establishment of a Joint Board, CC Docket Nos. 78-72 and 80-286, 49 Fed. Reg. 48325 (Dec. 12, 1984) (*Joint Board Recommendation*), adopted by Commission, 50 Fed. Reg. 939 (Jan. 8, 1985) (*Order Adopting Recommendations*).

[3] 47 C.F.R. Part 36, Appendix-Glossary.

[4] *See Joint Board Recommendation*, 49 Fed. Reg. at 48337, para. 65.

[5] *See generally* Amendment of part 36 of the Commission's Rules and Establishment of a Joint Board, CC docket no. 80-286, Notice of proposed Rulemaking, 5 FCC Rcd 5974 (1990) (*Study Area Notice*). The Commission therein describes the factors that led to the present restriction on the study area changes and the reasons why it is proposing to change that restriction.

[6] Petition at 1.

[7] *See* Minnesota PUC Docket P420, 534/PA-92-1334. Of course if this representation is not true, Loretel and its filing agent are subject to penalties that are provided under applicable statutes and the Commission's rules.

of its affiliate Loretel Systems South, Inc., for waiver of Part 36, Appendix-Glossary, of the Commission's Rules IS GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Gerald P. Vaughan
Deputy Chief (Operations)
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

RESERVESMART, INC.,
Complainant,

v. File No. E-91-97

MCI TELECOMMUNICATIONS
CORPORATION,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1994; Released: March 23, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION

1. We have before us a formal complaint filed by ReserveSmart, Inc., ("RSI") against MCI Telecommunications Corporation ("MCI"). RSI alleges that MCI's practice of charging RSI's 800 number account for calls for which MCI could not provide identifying information and its subsequent disconnection of RSI's telephone service for non-payment of 800 service charges were unjust and unreasonable under Section 201(b) of the Communications Act, 47 U.S.C. § 201(b).[1] RSI seeks a Commission order declaring MCI's actions to be unlawful and awarding RSI monetary damages.[2] MCI has denied the allegations and has moved to dismiss the complaint.[3] For the reasons discussed below, we deny RSI's complaint.

II. Background and Contentions of the Parties

2. The record reflects that RSI purchased 800 services from MCI between 1988 and 1989 in the states of Connecticut and Indiana.[4] The dispute in this matter centers around RSI's claim that MCI routinely charged it for calls that MCI claims were made to RSI's 800 number even though MCI could not identify the calls when requested by RSI.[5] Although RSI does not, in its complaint or subsequent pleadings, specify or elaborate on what it means by "identify the calls," it appears that it is referring to MCI's failure to provide the ten digit automatic number identification (ANI) of calls placed to RSI's 800 number. RSI also claims, without reference to underlying facts or supporting documentation, that MCI refused to properly consider its claims for credits for unidentified calls and improperly disconnected RSI's telephone service for nonpayment of the disputed charges.[6] RSI contends that as a result of MCI's actions, it has paid MCI for services that it did not receive, lost business revenues and suffered harm to its reputation.[7]

3. MCI makes two principal arguments to support its contention that RSI's complaint should be dismissed for failure to state a claim under the Communications Act. First, MCI asserts that the implication in RSI's complaint that it is charging RSI for calls that were never delivered to RSI is completely unfounded.[8] According to MCI, its switches automatically record calls to 800 numbers transmitted by the local exchange carrier (LEC), and MCI's billing system then generates a billing record based on the call record generated by the MCI switch. MCI states that the fact that the MCI switch records the call transmitted by the LEC is proof that the call occurred.[9]

4. Second, MCI contends that it is neither required to, nor capable of, providing the identifying information that

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[1] Section 201(b) provides in pertinent part that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, or classification that is unjust and unreasonable is ... unlawful."

[2] RSI's complaint stems from a federal district court action brought by MCI against RSI in the Northern District of Indiana, South Bend Division, to collect unpaid charges. On June 13, 1990 the court ordered that the "... issue raised by RSI in its affirmative defenses and counterclaims as to whether [MCI's] practice of charging RSI's 800 number account for calls from telephone numbers which MCI cannot identify is just and reasonable be referred to the Federal Communications Commission for decision." MCI Telecommunications Corporation v. ReserveSmart, Inc., Case No. S90-00010 (June 13, 1990). RSI filed the instant complaint to place the matter before the Commission on May 2, 1991.

[3] MCI filed an answer and a motion to dismiss the complaint on July 5, 1991. MCI has also filed a motion to strike RSI's objection to its motion to dismiss, filed by RSI on September 18, 1991, as untimely under the Commission's rules. In the interest of obtaining a full record in this matter, we deny MCI's motion to strike and accept RSI's objection to MCI's motion to dismiss into the record.

[4] In July 1988, RSI moved its business offices from Stanford, Connecticut to Elkhart, Indiana. Complaint at 3.

[5] *Id.*

[6] *Id.* at 4-5.

[7] *Id.*

[8] *See* MCI's Motion to Dismiss at 2.

[9] *Id.* at 3-4. According to MCI,

> Calls received at MCI switches through LEC provided access from non-equal access end offices contain an 'OOY' code as part of the 800 number dialed by the calling party. The OOY code is a LEC industry method of identifying calls from non-equal access areas for 800 calls. The calls have the '800' portion of the call replaced with the OOY code which identifies the specific LEC switch from which the call originated. These calls are recorded by MCI switches in exactly the same manner as calls containing ANI except the ANI portion of the call is not populated in the call record. In MCI's billing system, the OOY code, which is recorded as part of the call record, is associated with the LEC switch in order to determine the geographic region from which the call originated.

Id., note 5. RSI does not allege in its complaint that any of the disputed telephone calls were placed within equal-access areas.

RSI seeks.[10] According to MCI, it is capable of delivering ANI to its 800 service customers only when 800 calls are placed from within "equal access areas" or locations inside LEC serving areas that are technically capable of furnishing access to caller locations equivalent to that furnished the American Telephone and Telegraph Company (AT&T) by its former affiliates, the Bell Operating Companies. MCI states that to receive "ubiquitous 800 access," it is required by LECs to purchase access through so-called LATA tandem switches that provide 800 access from non-equal access end offices.[11] MCI further states that the tariffs which define the relationship between MCI and the LECs clearly reveal that caller ANI is not delivered to MCI from callers within non-equal access areas.[12] Thus, MCI contends, because its inability to deliver certain ANI information to RSI is reflected in the tariffs of its suppliers as well as its own, there is no basis to conclude that MCI has violated the Communications Act or any Commission rule or order.

III. DISCUSSION

5. Initially, we note that neither party sought any discovery in this proceeding, nor did the complainant respond to a request issued by the staff to both parties to provide additional information and arguments in support of their claims.[13] After careful review of the limited record developed in this matter, we find no basis for a ruling that MCI violated Section 201(b) of the Act as alleged in the complaint.

6. It is well established that in a formal complaint proceeding pursuant to Section 208 of the Act,[14] the complainant has the burden of proof.[15] The crux of the case presented by RSI is its bare claim that MCI's practice of charging for 800 service calls which it can not identify by calling number forced RSI to pay for services that it did not receive. RSI does not provide evidence or arguments to support its claim that it paid for calls never placed to its 800 number, nor does it cite any Commission or court precedent that would support a determination that a carrier's failure to identify an 800 call by calling number is *per se* unreasonable within the meaning of Section 201(b) of the Act.[16] Indeed, RSI makes no attempt whatsoever to refute evidence and arguments presented by MCI to show: (1) that bills to RSI generated by MCI's billing system accurately reflect charges for calls placed to RSI's 800 number and (2) that MCI is neither required to, nor capable of, providing the caller identification requested by RSI. Therefore, in the absence of any persuasive showing by RSI that it was charged for calls that were not made or that MCI's failure to provide the requested information was unjust and unreasonable within the meaning of Section 201(b), we deny RSI's complaint.[17]

IV. ORDERING CLAUSES

7. Accordingly, IT IS ORDERED, pursuant to Sections 4(i) and 208 of the Communications Act of 1934, as amended 47 U.S.C. § 154(i) and 208, and the authority delegated by Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, that the above-captioned complaint filed by ReserveSmart, Inc., IS DENIED.

8. IT IS FURTHER ORDERED that MCI's motion to strike RSI's objection to its motion to dismiss IS DENIED.

9. IT IS FURTHER ORDERED that MCI's motion to dismiss RSI's complaint IS DISMISSED as moot.

FEDERAL COMMUNICATIONS COMMISSION

Richard Metzger
Acting Chief
Common Carrier Bureau

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[10] *Id.* at 4.

[11] *See* MCI Motion to Dismiss at 4, citing The Bell Atlantic Telephone Companies, Tariff F.C.C. No. 1, Section 6.2.5(A), 2nd Revised Page 179.1.

[12] MCI adds that its Tariff F.C.C. No. 1, Section C 3.0863 discloses that caller ANI is deliverable only when 800 calls are placed from equal access areas. MCI Motion to Dismiss at 5.

[13] *See* Letter from Renee Terry, Commission Counsel, dated April 29, 1992. MCI responded to the staff's request on May 13, 1992 by submitting the Affidavit of Robert Woodrow Traylor, a senior staff member who MCI states is responsible for analyzing the technical terms and conditions surrounding the purchase of exchange access from access providers.

[14] 47 U.S.C. § 208.

[15] *See* Amendment of Rules Concerning Procedures to be Followed When Formal Complaints Are Filed Against Common Carriers, 8 FCC Rcd 2614, 2616-2617 (1993). *See also, e.g.*, Connecticut Office of Consumer Counsel v. AT&T Communications, 4 FCC Rcd 8130, 8133 (1989), *aff'd sub nom., Connecticut Office of Consumer Counsel v. FCC*, 915 F.2d 75 (2d Cir. 1990), *cert. denied*, 111 S. Ct. 1310 (1991).

[16] RSI has not cited any specific rule, policy or order of the Commission that would require MCI to provide the type of information RSI requests under the circumstances described in the complaint.

[17] In light of our decision denying RSI's complaint, we need not address in detail MCI's arguments that the complaint should be dismissed for failure to state a claim. Nevertheless, we believe that one observation regarding MCI's dismissal claims is appropriate. Allegations that a common carrier has engaged in a billing practice that requires a customer to pay for interstate calls that were never placed would be sufficient in any case to state a cause of action under Title II of the Act, 47 U.S.C. §§ 201 *et seq*. Our decision in the instant case is that RSI has failed to sustain its burden of proof, not that it has failed to present a proper claim.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Fairview Communications, Inc.
Licensee, Station WBHT-FM
Mountaintop, Pennsylvania

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 15, 1994; Released: March 23, 1994

By the Chief, Mass Media Bureau:

1. The Commission by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability (NAL), 9 FCC Rcd 280 (1994), assessing a forfeiture of $5,000 against Fairview Communications, Inc., for violation of Section 73.1206 of the Commission's Rules, and (2) Fairview Communications' Request for Reduction in Forfeiture, filed January 21, 1994.

2. Section 73.1206 in pertinent part requires that before broadcasting a telephone conversation live, or recording it for broadcast, a licensee inform any party to the call of the licensee's intention either to record the conversation for broadcast or to broadcast the call simultaneously with its occurrence. Our NAL reflected our finding that a Station WBHT-FM disc jockey placed a telephone call to the office of the Mayor of Kingston, Pennsylvania, spoke with Ms. Kathleen Mras, Municipal Secretary, recorded the conversation, and broadcast it over the air without informing Ms. Mras of the intended broadcast.

3. Fairview Communications did not, and does not now, dispute the fact that the incident occurred. Rather, it urges that the forfeiture should be reduced to reflect the minor nature of the violation and its own history of overall compliance with Commission Rules. With respect to the first contention, we cannot agree that the violation was minor. Fairview Communications argues that this was an isolated incident for which an apology was issued and from which no harm or embarrassment resulted. Our rule, however, protects individuals' legitimate expectations of privacy in their telephone conversations, *Amendment of Section 73.1206*, 3 FCC Rcd 5461 (1988). In broadcasting Ms. Mras' conversation without prior notice, Station WBHT-FM did precisely that which the rule prohibits, and in the process reduced the privacy expectation that the rule confers.

4. While we cannot dismiss the violation as minor, we are persuaded that the forfeiture amount should be adjusted downward to reflect Fairview Communications' history of compliance with Commission Rules. Hence, we will reduce the forfeiture to $3,500 on this basis, *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).

5. Accordingly, the Request for Reduction in Forfeiture filed by Fairview Communications, Inc., IS GRANTED to the extent indicated herein, and IS DENIED in all other respects. IT IS ORDERED, that Fairview Communications, Inc., licensee of Station WBHT-FM, Mountaintop, Pennsylvania, FORFEIT to the United States three thousand five hundred dollars ($3,500) for its violation of Section 73.1206 of the Commission's Rules. Payment of the forfeiture may be made by following the instructions on the enclosed form. In regard to this forfeiture proceeding, the licensee may take any of the steps set forth in Section 1.80 of the Commission's Rules, as summarized in the attachment to this Memorandum Opinion and Order.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart,
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Liability of
Masada, Ltd.
Licensee, Station KBAC-FM
Las Vegas, New Mexico

For a Forfeiture

MEMORANDUM OPINION AND ORDER

Adopted: March 14, 1994; Released: March 23, 1994

By the Chief, Mass Media Bureau:

1. The Commission, by the Chief, Mass Media Bureau, acting pursuant to authority delegated by Section 0.283 of the Commission's Rules, has under consideration (1) a Notice of Apparent Liability, released May 14, 1993, 8 FCC Rcd 3225, assessing a forfeiture of $20,000 against Masada, Ltd., licensee of Station KBAC-FM, Las Vegas, New Mexico, for violation of Section 73.1125 of the Commission's Rules, and (2) a Petition for Remission or Mitigation, filed June 7, 1993, by the licensee.

2. Our forfeiture assessment reflected Masada's admission that its main studio was not located within the principal community contour, as required by Section 73.1125. The licensee thus does not dispute the assessment *per se*, urging instead that the forfeiture amount is too high. Masada states that on receiving our June 10, 1991, letter of inquiry, it undertook immediate efforts to establish a main studio in Las Vegas, entering negotiations for new or shared studio space with several local stations and educational institutions. Management-level staff was also installed in a KBAC-FM office in Las Vegas. Masada reports that finally, almost two years after our original letter of inquiry, its main studio was constructed and operational in Las Vegas in March, 1993, following many difficulties and disappointments. These continuing efforts and ultimate compliance justify at least mitigation to a lesser amount, the licensee contends. Moreover, it continues, a $20,000 assessment is excessive for a station licensed to so small a community and market.

3. Our $20,000 assessment represented a base forfeiture amount of $10,000, increased because the violation continued over a substantial period of time. Masada states in its petition that almost two years after our original letter of inquiry, it finally achieved compliance with Section 73.1125. This compliance, however, does not alter the nature of its original conduct, the fact that it did not undertake corrective action until after our letter of inquiry, or the validity of our original assessment, which recognized the unsuccessful efforts to secure a main studio recounted in the petition. Market size, further, is not a downward adjustment criteria under our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *pet. for review pending sub nom. USTA v. FCC*, No. 92-1321 (D.C. Cir. filed July 30, 1992).[1]

4. Accordingly, the Petition for Remission or Mitigation filed by Masada, Ltd., IS DENIED. IT IS ORDERED, that Masada, Ltd., licensee of Station KBAC-FM, Las Vegas, New Mexico, FORFEIT to the United States the sum of twenty thousand dollars ($20,000) for the willful and continuing violation of Section 73.1125 of the Commission's Rules. Payment of the forfeiture may be made by mailing to the Commission, at the address indicated in the attachment to this Memorandum Opinion and Order, a check or similar instrument payable to the Federal Communications Commission. In regard to the forfeiture proceeding, the licensee may take any of the actions set forth in Section 1.80 of the Commission's Rules.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

[1] The size of the forfeiture in *Metro Program Network, Inc.*, 5 FCC Rcd 2940 (1990), cited by Masada, is not relevant here. The violation in that case predated the amendment to the Communications Act of 1934, as amended, that increased the maximum dollar amounts of forfeitures the Commission could impose.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-277

In the Matter of

Amendment of Section 73.202(b), RM-8324
Table of Allotments,
FM Broadcast Stations.
(Warrior, Alabama)

REPORT AND ORDER
(Proceeding Terminated)

Adopted: March 14, 1994; Released: March 24, 1994

By the Acting Chief, Allocations Branch:

1. The Commission considers herein the *Notice of Proposed Rule Making*, 8 FCC Rcd 8146 (1993), issued in response to a petition filed on behalf of North Jefferson Broadcasting Company, Inc. ("petitioner"), permittee of Station WLBI(FM), Channel 254A, Warrior, Alabama, proposing the substitution of Channel 254C3 for Channel 254A and modification of its authorization accordingly to specify the higher class channel. Petitioner filed supporting comments reiterating its intention to apply for Channel 254C3, if it is allotted to Warrior. No other comments were received.

2. We believe the public interest would be served by substituting Channel 254C3 for Channel 254A at Warrior since it would provide an enhanced service to the community. Therefore, in accordance with the provisions of Section 1.420(g) of the Commission's Rules, we will substitute Channel 254C3 for Channel 254A and modify the authorization of North Jefferson Broadcasting Company, Inc. for Station WLBI(FM), as requested.

Technical Statement

3. As stated in the *Notice*, Channel 254C3 can be allotted to Warrior at the petitioner's specified site, located 9.5 kilometers (5.9 miles) northwest of the community at coordinates 33-53-04 and 86-52-01, in conformity with the minimum distance separation requirements of Section 73.207(b)(1) of the Commission's Rules.

4. Accordingly, pursuant to the authority contained in Sections 4(i), 5(c)(1), 303(g) and (r) and 307(b) of the Communications Act of 1934, as amended, and Sections 0.61, 0.204(b) and 0.283 of the Commission's Rules, IT IS ORDERED, That effective **May 9, 1994**, the FM Table of Allotments, Section 73.202(b) of the Commission's Rules, IS AMENDED with respect to Warrior, Alabama, as follows:

City	Channel No.
Warrior, Alabama	254C3

5. IT IS FURTHER ORDERED, That pursuant to Section 316(a) of the Communications Act of 1934, as amended, the authorization of North Jefferson Broadcasting Company, Inc. (BPH-891214MJ) for Station WLBI(FM), Warrior, Alabama, IS MODIFIED to specify operation on Channel 254C3 in lieu of Channel 254A, subject to the following conditions:

(a) Within 90 days of the effective date of this *Order*, the permittee shall submit to the Commission a minor change application for a construction permit (Form 301), specifying the new facility;

(b) Upon grant of the construction permit, program tests may be conducted in accordance with Section 73.1620; and

(c) Nothing contained herein shall be construed to authorize a change in transmitter location or to avoid the necessity of filing an environmental assessment pursuant to Section 1.1307 of the Commission's Rules.

6. Pursuant to Commission Rule Section 1.1104(1)(k) and (2)(k), any party seeking a change in community of license of an FM or television allotment or an upgrade of an existing FM allotment, if the request is granted, must submit a rule making fee when filing its application to implement the change in community of license and/or upgrade. As a result of this proceeding, North Jefferson Broadcasting Company, Inc., permittee of Station WLBI(FM), is required to submit a rule making fee in addition to the fee required for the applications to effectuate the upgrade at Warrior, Alabama.

7. IT IS FURTHER ORDERED, That this proceeding IS TERMINATED.

8. For further information concerning the above, contact Nancy Joyner, Mass Media Bureau, (202) 634-6530.

FEDERAL COMMUNICATIONS COMMISSION

Victoria M. McCauley
Acting Chief, Allocations Branch
Policy and Rules Division
Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 90-557

In re Applications of

PRAISE BROADCASTING NETWORK, INC. File No. BPH-880519ME

WRIGHTSVILLE BEACH RADIO LIMITED PARTNERSHIP File No. BPH-880519MI

For Construction Permit for a
New FM Station on Channel 229A,
Wrightsville Beach, North Carolina

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1994; Released: March 24, 1994

By the Review Board: MARINO (Chairman), BLUMENTHAL and GREENE.

1. Before the Review Board is a pleading styled "Citation of Additional Authority and Request for Summary Decision" filed January 12, 1994 by Praise Broadcasting Network, Inc., and an opposition filed thereto on January 26, 1994 by Wrightsville Beach Radio Limited Partnership.

2. This proceeding first came before the Board on exceptions to Administrative Law Judge Joseph Chachkin's *Initial Decision*, 7 FCC Rcd 4075 (1992), which selected Wrightsville Beach as the comparatively superior applicant because of its greater quantitative integration of ownership into management, a factor the Commission then considered to be of "substantial importance" in comparing competing applicants. *See Policy Statement on Comparative Broadcast Hearings*, 1 FCC Rcd 393, 395 (1965). Without addressing exceptions going to the comparison of the applicants, the Board remanded the proceeding to the Administrative Law Judge for further hearing and issuance of a supplemental initial decision on two issues: (1) whether Wrightsville Beach is financially qualified; and (2) whether Wrightsville Beach falsely certified to its financial qualifications. *See Praise Broadcasting Network, Inc.*, 8 FCC Rcd 5457 (Rev. Bd. 1993). Praise reports that the hearing record on the remanded issues has been closed, the parties have filed supplemental and reply findings, and the supplemental initial decision will be forthcoming. Nonetheless, Praise argues that the Board should intervene now and select it as the comparatively superior applicant on the basis of its alleged civic activities and minority ownership without regard to the integration factor found to be arbitrary and capricious in *Bechtel v. FCC*, No. 92-1378 (D.C. Cir. Dec. 17, 1993). This request will be dismissed.

3. Summary decision by the presiding officer, not a reviewing authority like the Board, is appropriate if there is no genuine issue as to any material fact and the moving party is entitled to a decision as a matter of law.[1] *See* 47 C.F.R. 1.251; *Summary Decision Procedures*, 24 RR 2d 1715, 1717 (1972). Although Praise alternatively asks that the Board direct the ALJ to act in accordance with its wishes, this too is inappropriate. As Wrightsville Beach has noted, the policy governing selection between qualified competing applicants is unsettled in the wake of *Bechtel*. Praise would have the Board give decisional significance to factors that have historically been considered only as enhancements to an applicant's integration claim, but any determination to give these factors weight apart from integration is a matter of policy to be decided by the Commission in the first instance. The result sought by Praise was not directed by the *Bechtel* court. *See Bechtel*, slip op. at 23. The Board is a subordinate body without policy-making authority and must await Commission guidance on this policy matter. *See* 47 C.F.R. 0.362 ("The Review Board shall decide each matter before it . . . in accordance with the Communications Act of 1934, as amended, rules and regulations, case precedent, and established policies of the Commission."); *see also Charles County Broadcasting Co., Inc.*, 24 RR 1153, 1158 ¶ 12 (Rev. Bd. 1962), *modified on other grounds*, 25 RR 903, 906 ¶ (1963) (quoting from ¶ 12 with approval); *accord Horne Industries, Inc.*, 91 FCC 1193, 1194 ¶ 1 (Rev. Bd. 1982). The Commission recently announced its intention to hold analysis of comparative proposals in abeyance at all levels of the adjudication process pending its consideration of appropriate action in light of *Bechtel*. *Public Notice*, FCC 94-41, Feb. 25, 1994 (FCC Freezes Comparative Proceedings).[2]

4. ACCORDINGLY, IT IS ORDERED That the pleading styled Citation of Additional Authority and Request for Summary Decision filed January 12, 1994 by Praise Broadcasting Network, Inc., IS DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Marjorie Reed Greene
Member, Review Board

[1] A summary decision obviates the need for a fact-finding hearing on some or all issues and is subject to appeal or review in the same manner as an initial decision. *See* 47 C.F.R. 1.251(e).

[2] This Public Notice advises that administrative law judges will proceed with issuance of supplemental initial decisions on remanded basic qualifying issues.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Relm Communications, Inc.
Indianapolis, Indiana

NAL/Acct. No. 415HF0005

Liability for Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: March 17, 1994; Released: March 25, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability to a Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (the Act), 47 U.S.C. § 503(b), to Relm Communications, Inc. (Relm), for violating Sections 90.209(c)(1)(iii) and 2.931 of the Commission's Rules, 47 C.F.R. §§ 90.209(c)(1)(iii) and 2.931, by producing equipment that failed to comply with the radiated emission limits and that was not representative of the data submitted with the application for type acceptance.

2. The appropriate amount of forfeiture for this violation is $7,000.

II. BACKGROUND

3. Relm manufactures a land mobile transmitter that bears the FCC type acceptance identification symbol ARUSLU250. It is approved for licensing under Part 90 of the Commission's Rules, including the limits on radiation of spurious emissions. Equipment that fails to meet these technical requirements cannot be granted an equipment authorization and cannot be marketed.

4. In receiving a grant of an equipment authorization, the grantee (Relm) certifies that all equipment manufactured and marketed under that equipment authorization will continue to be representative of the unit of equipment and its test data that was submitted with the application for type acceptance.[1]

III. DISCUSSION

5. On March 24, 1993, the Commission's Sampling and Measurements Branch, Office of Engineering and Technology (Lab), requested a sample of the unit produced under FCC Identifier ARUSLU250 for testing. The test sample was received on April 20, 1993, and was tested on April 21, 1993. During testing, an emission at 2.78 GHz was detected that exceeded by 6dB the level permitted by Section 90.209(c)(1)(iii) of the Rules.

6. In response to a notification from the Lab of the non-compliance, Relm indicated that it had conducted subsequent tests that showed that some units did not comply with the equipment authorization, that it had halted production on the unit, and that it had designed a shield for retrofitting past production as well as for incorporation into future production of the equipment.

IV. CONCLUSIONS

7. Relm violated Sections 2.931 and 90.209(c)(1)(iii) of the Commission's Rules by producing and marketing more than one unit that radiated unacceptable levels of spurious emissions and was not representative of the sample of equipment upon which data for the application for type acceptance was gathered and approval granted.

8. The violation was willful.[2]

9. Pursuant to our *Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), (*1993 Policy Statement*), the base forfeiture amount for marketing unauthorized equipment is $7,000. Consistent with the discretion we expressly reserved in the *1993 Policy Statement*, the forfeiture is $7,000.

V. ORDERING CLAUSES

10. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(f) of the Commission's Rules, 47 C.F.R. § 1.80(f), that Relm Communications, Inc. IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of $7,000 for marketing unauthorized equipment in violation of Section 302(b) of the Act and Section 2.803 of the Commission's Rules. The amount specified was determined after consideration of the factors set forth in Section 503(b) of the Act.

11. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, 47 C.F.R. § 1.80(f)(3), that Relm Communications, Inc. shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[3] Forfeitures shall be paid by check or money order payable to the Federal Communications Commission. The NAL/Acct. No. 415HF0005 should be written on your check or money order. Mail the payment to the following address:

Federal Communications Commission
P.O. Box 73482
Chicago, IL 60673-7482

Send written responses regarding why the forfeiture should be reduced or not imposed to:

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[1] *See* Section 2.931 of the Commission's Rules, 47 C.F.R. § 2.931.

[2] The term "willful", when used with reference to the commission or omission of any act, means the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of the Act [or the Commission's Rules]/ *See* H.R. Rep. No. 97-765, 97th Cong. 2nd Sess. 50-51 (1982).

[3] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

Federal Communications Commission
Chief, Legal Branch, Enforcement Division, FOB
Stop Code 1500E3, Attn: NAL/Acct. 415HF0005
1919 M Street, N.W.
Washington, DC 20554

12. IT IS FURTHER ORDERED that this notice shall be sent by certified mail, return receipt requested, to Relm Communications, Inc., Attn: John W. Englert, 7707 Records Street, Indianapolis, IN 46226.

FEDERAL COMMUNICATIONS COMMISSION

Lauren J. Belvin, Chief
Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Applications of

VIACOM INC. File Nos. BTCCT-930921KG through KM

For Commission Consent to
the Transfer of Control of
Paramount Communications Inc.

MEMORANDUM OPINION AND ORDER

Adopted: March 8, 1994; Released: March 8, 1994

By the Commission:

1. On November 23, 1993, the Commission granted a special temporary authorization (STA) to Glen O. Robinson as trustee on behalf of Viacom Inc. (Viacom), which has since prevailed in a tender offer contest for control of Paramount Communications Inc. (Paramount). *See Viacom Inc.*, 8 F.C.C. Rcd 8439 (1993).)[1] Now before the Commission are long-form applications, FCC Form 315, seeking a transfer of control of Paramount from trustee Robinson to Viacom. Because Viacom holds, either directly or through wholly owned subsidiaries, the licenses of radio stations located in the same markets as two of the Paramount television stations, it also seeks unopposed waivers of the one-to-a-market rule, Section 73.3555(c).[2] QVC Network, Inc. (QVC) filed a petition to deny or defer Commission action, as well as further comments, and Viacom responded only to the QVC comments. Shortly after more than 50.1 percent of Paramount shareholders tendered their stock to Viacom on February 14, 1993, QVC terminated its tender offer, requested that the Commission dismiss its pending long-form applications, and indicated that it would not pursue its opposition to Viacom's application.[3]

BACKGROUND

2. Revised several times since the Commission granted an STA to trustee Robinson, Viacom's tender offer for purchase of 50.1 percent of Paramount common stock at $107 per share constitutes the first step in a two-tiered process for acquiring the entire common stock interest in Paramount. The "second step merger" involves the conversion of the remaining 49.9 percent of Paramount common stock issued and outstanding into the right to receive a package of Viacom securities.[4] Upon completion of the merger, National Amusements, Inc. (NAI), which currently is the single majority shareholder of Viacom, will hold 62 percent of the merged entity's voting stock.[5] NAI, in turn, is, and will continue to be, controlled by Sumner M. Redstone, in his capacity as trustee of the Sumner M. Redstone Trust.

MULTIPLE OWNERSHIP/ CROSS-INTEREST MATTERS

3. *Background.* The merger of Viacom and Paramount will result in the common ownership of Paramount's seven UHF television stations[6] and Viacom's five television[7] and 14 radio stations.[8] Also attributable to the merged entity will be three television stations licensed to Combined Broadcasting, Inc. (Combined), in which Paramount holds a 6.4565 percent interest, obtained in a bankruptcy proceeding.[9] *See Paramount Communications, Inc.*, 7 F.C.C.

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[1] G. William Miller, the trustee-designate of QVC Network, Inc., the competing bidder for Paramount, was also granted a STA on November 23, 1993. *QVC Network, Inc.*, 8 F.C.C. Rcd 8485 (1993), *reconsideration dismissed as moot*, by staff letter of March 2, 1994.

[2] The one-to-a-market rule generally proscribes common ownership of a television station and a radio station in the same market.

[3] Once a petition to deny is filed, we are obligated to consider its merits, regardless of the fact that it is subsequently dismissed. *Booth American Company*, 58 F.C.C. 2d 553, 554 (1976). We have reviewed QVC's allegations and find that they do not raise a substantial and material question as to Viacom's qualifications.

[4] According to Amendment No. 35 to Viacom's Schedule 14D-1 tender offer statement, submitted under Securities and Exchange Commission rules, each remaining share of Paramount stock will be converted into: 0.93065 shares of Viacom Class B, non-voting common stock; $17.50 in principal amount of Viacom eight-percent, exchangeable subordinated debentures; 0.93065 of Viacom contingent value right; 0.5 of a three-year warrant to purchase an additional share of Viacom Class B common stock at $60 per share; and 0.3 of a five-year warrant to purchase an additional share of Class B common stock at $70 per share.

[5] NAI, according to Viacom's February 10, 1994 application amendment, will continue to be the single majority shareholder, with 62 percent of the voting stock, even after consummation of its separate merger with Blockbuster Entertainment Corporation, with which it entered a definitive merger agreement on January 7, 1994.

[6] Paramount, through its seven wholly owned subsidiaries, holds Commission licenses for: WKBD, Channel 50 (Fox), Detroit, Michigan; KTXH, Channel 20 (Ind.), Houston, Texas; KRRT, Channel 35 (Fox), Kerrville, Texas; WDCA, Channel 20 (Ind.), Washington, D.C.; KTXA, Channel 21 (Ind.), Arlington, Texas; WTXF, Channel 29 (Fox), Philadelphia, Pennsylvania; and WLFL, Channel 22 (Fox), Raleigh, North Carolina.

[7] The Viacom-controlled television stations are: WHEC-TV, Channel 10 (NBC), Rochester, New York; KSLA-TV, Channel 12 (CBS), Shreveport, Louisiana; KMOV-TV, Channel 4 (CBS), St. Louis, Missouri; WNYT-TV, Channel 13 (NBC), Albany, New York; and WVIT, Channel 30 (NBC), New Britain, Connecticut.

[8] The Viacom-controlled radio stations are: KXEZ(FM), Los Angeles, California; WLTI(FM), Detroit, Michigan; WLIT(FM), Chicago, Illinois; KBSG(AM), Auburn, Washington; KBSG-FM, Tacoma, Washington; WMZQ(AM), Arlington, Virginia; WMZQ-FM, Washington, D.C.; WCPT(AM), Alexandria, Virginia; WCXR-FM, Woodbridge, Virginia; WLTW(AM), New York, New York; KYSR(FM), Los Angeles, California; KNDD(FM), Seattle, Washington; KSRY(FM), San Francisco, California; KSRI(FM), Santa Cruz, California.

[9] Through its wholly owned Paramount Pictures Corporation, Paramount holds the attributable interest in Combined, which

Rcd 1390 (1992). Because holding attributable interests in more than twelve television stations is generally prohibited by the Commission's national multiple ownership rule, Sections 73.3555(e)(1) and (2),[10] Viacom has pledged that in the event the three Combined stations have not been divested prior to completion of the Paramount-Viacom merger, it will either sell the Paramount interest in Combined to a third party or place the entire interest into an irrevocable voting trust, insulated in accordance with Commission rules and policies. Either one of these actions would eliminate all attributable interest in the Combined stations, rendering Paramount in compliance with the twelve-station rule. Because neither has been implemented, however, we shall condition any grant of these applications upon Paramount's divestiture or appropriate insulation of its interest in Combined. We reiterate that, until one of these measures is effectuated, control of Paramount's licensed facilities rests with, and must be exercised solely by, Viacom trustee Robinson, who alone is authorized to vote, subject to certain restrictions, the shares obtained via the tender offer.

4. The Paramount-Viacom merger will create, in contravention of the Commission's "one-to-a-market" rule,[11] Section 73.3555(c), a radio-television combination in Detroit and a TV/2 AM/2 FM combination in Washington, D.C. Accordingly, Viacom requests permanent waivers for its TV/AM/FM combination in the Detroit market and for what will ultimately be a TV/AM/FM combination in the Washington, D.C. market, as well as a temporary waiver to allow orderly divestiture of an AM and FM in the Washington, D.C. market.[12]

5. *One-to-a-market waiver requests.* In *Second Report and Order* in MM Docket No. 87-7, 4 F.C.C. Rcd 1741, 1751 *reconsidered in part,* 4 F.C.C. Rcd 6489 (1989), the Commission concluded that it will "look favorably" upon waiver requests involving radio and television station combinations in the top 25 markets, as defined by Arbitron Ratings Company, where at least 30 separately owned, operated and controlled broadcast licensees, or "voices," will remain after the proposed combination. The number of voices in a particular market is determined by counting all commercial and noncommercial full-power television licensees in the relevant area of dominant influence (ADI) television market and all operating AM and FM radio licensees in the relevant television metropolitan market.

6. In support of its permanent waiver request for the Detroit market, where Paramount's WKBD(TV) and Viacom's WLTI(FM) will be commonly owned, Viacom states, based upon the 1992-93 Arbitron Television Markets and Ranking Guide, as reported in *Television & Cable Factbook 1993,* that Detroit, with its nine television stations and 48 AM and FM radio stations, is the ninth largest television market. Of these 57 broadcast stations, Viacom notes, at least 44 will remain separately owned, operated and controlled after the Paramount-Viacom merger. Accordingly, Viacom contends, the proposed television-radio combination in Detroit falls within the presumptive waiver standard established in the *Second Report and Order* for "top 25 markets/30 voices" cases. We have reviewed the showing submitted by Viacom and, based upon the information before us, find that permanent waiver of the one-to-a-market rule in the Detroit market is in the public interest. *See, e.g., Malrite Communications Group, Inc.,* 8 F.C.C. Rcd 4212, 4213 (1993); *Susquehanna Radio Corp.,* 6 F.C.C. Rcd 6547 (1991).

7. As for the Washington, D.C. television market, since the November 1, 1993 consummation of a purchase agreement for WCPT(AM), Alexandria, Virginia, and WCXR-FM, Woodbridge, Virginia,[13] Viacom has held the licenses of four radio stations, including its WMZQ(AM), Arlington, Virginia, and WMZQ-FM, Washington, D.C. Common ownership of two AM stations and two FM stations, as Viacom asserts, is permissible in markets with more than 15 commercial radio stations, provided that the proposed radio combination has a combined audience share of 25 percent or less. *See* 47 C.F.R. §73.3555(a)(1)(ii); *Revision of Radio Rules and Policies,* 7 F.C.C. Rcd 2755, *recon. granted in part and denied in part,* 7 F.C.C. Rcd 6387 (1992). Those criteria, as Viacom demonstrated in its recent applications to acquire the two Washington, D.C.-area radio stations, have been satisfied. *See* FCC File Nos. BAL-930811EA and BALH-930811HZ, granted on October 21, 1993. But, the proposed merger, which will result in Viacom's additional ownership of Paramount's television station, WDCA, Washington, D.C., implicates the Commission's one-to-a-market rule. Viacom, which entered into a purchase agreement for the two radio stations prior to its takeover bid for Paramount, states that it intends to divest one of the AM stations and one of the FM stations in the Washington, D.C. market. Therefore, Viacom seeks, for its TV/2 AM/2 FM combination, only a temporary waiver of 18 months,

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holds, directly or through its wholly owned subsidiaries, the licenses of WGBS-TV, Philadelphia, WBFS-TV, Miami, and WGBO-TV, Joliet, Illinois.

[10] The national multiple ownership rule generally proscribes ownership of more than 12 television stations or the ownership of television stations whose aggregate national audience reach exceeds 25 percent. In calculating the audience reach, UHF television stations are attributed with only 50 percent of the television households in their markets. 47 C.F.R. §73.3555(e)(3)(i). The reach of the seven Paramount UHF television stations, according to Viacom, which obtained its figures from Arbitron's 1991-1992 estimated ADI household figures, is approximately 5.8 percent after the 50-percent multiplier is applied, while the reach of the five Viacom television stations, is 3.1 percent after the multiplier is applied to its two UHFs. Thus, the aggregate national audience reach of Paramount-Viacom, 8.9 percent, will be well below the Commission's 25-percent ceiling.

[11] A television station and a radio station are deemed to be in the same market if the 2 mV/m groundwave contour of an AM station, the 1 mV/m contour of an FM station, or the Grade A contour of a television station encompasses the entire community of license of the television or radio station.47 C.F.R. §73.3555(c).

[12] Viacom also requested in its long-form application waiver of the one-to-a-market rule for the Houston, Texas market, where Paramount's KTXH(TV) is located and where Viacom recently held the licenses for KIKK-FM, Houston, and KIKK(AM), Pasadena, Texas. The transfer of control of those Texas radio stations from Viacom to Group W Radio, Inc. was consummated on November 1, 1993, thereby obviating Viacom's need for the originally requested waiver. *See* FCC File Nos. BTCH-930811EF and BTC-930811EE, granted on October 20, 1993.

[13] The Commission granted the transfer-of-control applications for the two Washington, D.C.-area stations, from Group W Radio, Inc. to Viacom, on October 21, 1993. *See* FCC File Nos. BAL-930811EA and BALH-930811HZ.

commencing from the date of consummation of the Paramount merger. Because subsequent to disposition of those stations the merged Paramount-Viacom company will still hold a TV/AM/FM combination, a permanent waiver of the one-to-a-market rule is also required.

8. As justification for the separate waivers, Viacom indicates that Washington, D.C. is the nation's seventh largest television market, with thirteen television stations and 51 radio stations. Of these 64 broadcast stations, Viacom has demonstrated that at least 44 will remain separately owned, operated and controlled after the Paramount-Viacom merger. Based upon the information before us, we find that Viacom has satisfied the top 25 markets/30 voices standard and demonstrated that permanent waiver of the one-to-a-market rule for its proposed TV/AM/FM combination in the Washington, D.C. market would be in the public interest.

9. With regard to the temporary TV/2 AM/2 FM combination, Viacom maintains that Commission grant of an 18-month waiver will not undermine the principles underlying the Commission's rules, but instead will serve the public interest by permitting an orderly disposition of the two radio stations. We agree. Indeed, we have on more than one occasion permitted applicants seeking waiver of our multiple ownership rules an 18-month period to come into compliance with those rules in an "orderly" manner, especially where a "forced" sale could unnecessarily restrict the value of a station and artificially limit the range of potential buyers, to the exclusion of minorities. *E.g., Midwest Communications, Inc.*, 7 F.C.C. Rcd 159, 160 (1991); *Citadel Communications Company, Ltd.*, 5 F.C.C. Rcd 3842 (1990). Here, Viacom has pledged that in marketing the two radio stations, it will "undertake an affirmative action effort to increase the possibility of purchase of one or both of the stations by a minority-controlled entity." To identify such potential purchasers, Viacom represents that it will sponsor an informational meeting for interested minority buyers to discuss station facilities and assets, terms of the sale, sources of funds for broadcast station acquisitions, and the operation and application of the Commission's minority ownership policies. Additionally, Viacom represents that it will make its senior management available to meet with potential minority purchasers who have demonstrated the capacity to finance the purchase and operation of the stations. We believe that Viacom's proposal to seek out minority buyers for the two radio stations would be impossible for it to administer were we to require an immediate divestiture and we find that an 18-month period will spawn public benefits warranting grant of a temporary waiver.

10. *Other media interests of Paramount-Viacom directors.* After Viacom's separate mergers with Paramount and Blockbuster Entertainment Corporation (Blockbuster), according to Viacom's amended application, the merged entity's board of directors ultimately will be increased to a maximum of 20 members. Initially, however, Viacom notes that the merged entity will have a twelve-member board consisting of six directors nominated by Viacom, three by Blockbuster, two by NYNEX Corporation (NYNEX), which purchased $1.2 billion of Viacom Series B cumulative convertible preferred stock, and one independent director. One of the NYNEX-nominated directors, elected to the Viacom board in January 1994, *see* Amendment No. 36 to Viacom's Schedule 14D-1, is Frederic V. Salerno, who is also a director of Avnet, Inc. (Avnet). A subsidiary of Avnet, Channel Master Satellite Systems, Inc. (Channel Master), which is primarily engaged in the business of receive-antenna manufacturing, owns and operates a single cable television system. That system serves areas within the Grade B contour of Paramount's WLFL(TV), Raleigh, North Carolina. Viacom contends that Salerno should be relieved from attribution of the cable system, thereby avoiding implication of the Commission's cable-television cross-ownership rule, Section 76.501, because Avnet is a multi-faceted corporation, primarily engaged in electronics and semiconductors, and because Salerno's duties and responsibilities as a director are "wholly unrelated" to the Avnet subsidiary-operated cable system. The staff has previously been confronted with a similarly situated Paramount director, George Weissman, who also sits on the board of Avnet, and has permitted his recusal with regard to all matters involving the Channel Master cable television system as sufficient to relieve him of a cable-broadcast ownership conflict. *See* FCC File No. BALCT-930621KE, assignment of license for WKBD(TV), Detroit, Michigan. We agree that such limited recusal of a director of a parent corporation whose subsidiary is primarily engaged in a business distinct from its one and only cable television system is appropriate. Accordingly, we will require Salerno's recusal from all Channel Master matters that involve and/or implicate its cable television business.

11. In addition to serving on the boards of Viacom and Avnet, Salerno is a director of Bear Stearns Companies Inc. (Bear Stearns), whose subsidiary recently acquired a 5.2 percent interest in Telemundo Group Inc. (Telemundo), which controls seven television stations.[14] Viacom states that the Telemundo stations are not attributable to Salerno, because Telemundo, which currently operates as a debtor in possession under bankruptcy law, is controlled by a single majority shareholder, Reliance Capital Group, L.P.[15] However, if the Commission deems necessary, according to the Viacom application, Salerno will agree to recuse himself from all Telemundo matters. While we recognize the nonattributable status of Salerno's interest in Telemundo for purposes of the Commission's multiple ownership rules, we note that that interest nevertheless implicates our cross-interest policy, which was initially developed to scrutinize relationships not proscribed by the multiple ownership rules but which nevertheless triggered the Commission's concerns for full competition and diversity of viewpoint. *See Minnesota Broadcasting Corp.*, 13 F.C.C. 672 (1949); *United Community Enterprises, Inc.*, 37 F.C.C. 2d 953 (Rev. Bd. 1972). That policy is currently the subject of a rule making proceeding, *Notice of Inquiry*, 2 F.C.C. Rcd 3699 (1987), *Further Notice of Inquiry/Notice of Proposed Rule Making*, 4 F.C.C. Rcd 2035 (1989), but until modified, we shall abide by our case-by-case approach for addressing cross-interest situations. Based upon the infor-

[14] The Telemundo-controlled television stations are: WKAQ, Channel 2, San Juan, Puerto Rico; WSCV, Channel 51, Fort Lauderdale, Florida; KSTS, Channel 48, San Jose, California; WNJU, Channel 47, Linden, New Jersey; KTMD, Channel 48, Galveston, Texas; KVEA, Channel 52, Corona, California; and KVDA, Channel 60, San Antonio, Texas.

[15] The Ownership Report of Telemundo Group, Inc., filed with the Commission on February 1, 1994, indicates that Reliance Capital Group, L.P. directly owns approximately 42 percent of the stock of Telemundo and holds the exclusive and irrevocable power to vote and/or dispose of another approximately eleven percent of the Telemundo stock.

mation in this proceeding, we observe that Salerno, as director of both Paramount-Viacom and Bear Stearns, will hold interests in the parent companies of licensees operating in four of the same markets: (1) Los Angeles, where Telemundo's KVEA(TV), Viacom's KXEZ(FM) and KYSR(FM) are located; (2) New York, where Telemundo's WNJU(TV) and Viacom's WLTW(AM) are located; (3) Galveston, Texas, where Telemundo's KTMD(TV) and Paramount's KTXH(TV) are located; and (4) San Antonio, Texas, where Telemundo's KVDA(TV) and Paramount's KRRT(TV) are located. However, in view of the existence of a single majority shareholder and Bear Stearns' small minority holding, we believe that Salerno's potential influence over, and ability to exert control of, Telemundo, via his directorship at Bear Stearns, is attenuated and unlikely to diminish arm's length competition or diversity, the governing concerns of our cross-interest policy. *See, e.g., Metromedia Broadcasting Corp.*, 1 F.C.C. Rcd 1022 (1986). Accordingly, we will require no further action by Salerno with respect to his interests in Telemundo.

12. Finally, current Paramount director, and potential Paramount-Viacom director, Lester Pollack is also the director of Continental Cablevision, Inc. (Continental) and the chairman of LFCP Corp., the sole general partner of an investment manager which controls the voting and disposition of an attributable amount of Continental's voting securities.[16] Continental owns numerous cable television systems, one whose service area is within the Grade B contour of Viacom's KMOV(TV), St. Louis, Missouri, one serving the area within the Grade B contour of Viacom's WVIT(TV), New Britain, Connecticut, and another serving the area within the Grade B contour of Paramount's WKBD(TV), Detroit, Michigan.[17] Viacom contends that these television stations represent "only a small part" of the business activities of Paramount-Viacom[18] and notes that, should he become director, Pollack will recuse himself from all board matters relating to all Paramount and Viacom television stations. A director of a multi-faceted corporation may be relieved of an attributable interest where that director's duties and responsibilities "are neither directly nor indirectly related to the activities" of any broadcast licensee in which the corporation has a cognizable interest. *Attribution*, 97 F.C.C. 2d at 1025. We believe that Pollack's recusal from all subjects pertaining to all Paramount-Viacom television stations comports with this standard. Accordingly, we will require Pollack to recuse himself from all matters that involve and/or implicate the merged entity's television business.

CONCLUSION

13. In conclusion, we have reviewed the proposed merger, the petition to deny, the further comments and response and find that grant of the transfer of control of the seven Paramount television stations to Viacom will serve the public interest, convenience and necessity.

14. Accordingly, IT IS ORDERED, that the petition to deny and further comments filed by QVC ARE DISMISSED.

15. IT IS FURTHER ORDERED, that the applications for transfer of control of the seven Paramount television stations, BTCCT-930921KG through KM, to Viacom ARE GRANTED, as set forth above and subject to the condition that Viacom not assume control of Paramount until:

> Paramount and/or Viacom divest its interest in Combined Broadcasting, Inc. or insulate it in a trust approved by the Commission.

16. IT IS FURTHER ORDERED, that the request of Viacom for permanent waiver of the one-to-a-market rule, Section 73.3555(c) of the Commission's Rules, to permit common ownership of stations WKBD(TV), Detroit, Michigan, and WLTI(FM), Detroit, Michigan, IS GRANTED.

17. IT IS FURTHER ORDERED, that the request of Viacom for temporary waiver of the one-to-a-market rule, Section 73.3555(c) of the Commission's Rules, to permit common ownership of WDCA(TV), Washington, D.C., WCPT(AM), Alexandria, Virginia, WCXR-FM, Woodbridge, Virginia, WMZQ(AM), Arlington, Virginia, and WMZQ-FM, Washington, D.C., for a period not to exceed 18 months from the date of consummation of the Paramount merger IS GRANTED.

18. IT IS FURTHER ORDERED, that the request of Viacom for permanent waiver of the one-to-a-market rule, Section 73.3555(c) of the Commission's Rules, to permit common ownership of WDCA(TV), Washington, D.C. and an AM and an FM radio station, subsequent to its divestiture of one of the AMs and one of the FMs in paragraph 17, above, IS GRANTED.

19. The Mass Media Bureau will send copies of this Memorandum Opinion and Order to the parties to this proceeding by certified mail, return receipt requested.

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[16] LFCP Corp., according to the October 29, 1993 Viacom application amendment, is the sole general partner of Corporate Advisors, L.P., which serves as investment manager for an investment management account maintained by the State Board of Administration of Florida (State Board), which holds Continental voting stock, and controls the voting and disposition of Continental securities owned by ContCable Co-Investors, L.P. (ContCable), Vencap Holdings (1992) Pte Ltd. (Vencap) and, under most circumstances, by First Plaza Group Trust (First Plaza). LFCP, therefore, has an attributable interest in approximately 20.1 percent of the outstanding voting securities of Continental, the aggregate amount of Continental voting securities reportedly owned by State Board, ContCable, Vencap and First Plaza.

[17] Pollack's interest in Continental was previously disclosed to the Commission, in Paramount's 1993 application for the acquisition of WKBD(TV), Detroit. *See* FCC File No. BALCT-930621KE, granted August 27, 1993. It was represented in that application that Pollack would recuse himself from all WKBD(TV)-related matters confronting the Paramount board.

[18] Viacom and its subsidiaries, Viacom contends, comprise a "multi-faceted media company" which control: cable television systems serving approximately one million subscribers; premium program services such as Showtime, The Movie Channel and Flix; advertiser-supported program services such as MTV, VH-1, and Nickelodeon; Showtime Satellite Networks, Inc., which distributes programming to home television receive-only earth stations; and radio and television broadcast stations. Viacom subsidiaries also hold partnership interests in other cable television programming networks, such as Comedy Central, Lifetime and All News Channel.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CMT Partners — Transmittal No. 1
Revisions to Tariff F.C.C. No. 2

ORDER

Adopted: March 15, 1994; Released: March 15, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 8, 1994, CMT Partners (CMT) filed Transmittal No. 1 to introduce interstate cellular exchange access services to interexchange carriers in certain geographic areas in California. The transmittal is scheduled to take effect March 16, 1994. On February 23, 1994, MCI Telecommunications Corporation (MCI) filed a petition to reject or to suspend and investigate CMT's Transmittal No. 1. CMT filed a reply on March 7, 1994.

2. MCI argues that CMT is owned by McCaw Cellular Communications, Inc. (McCaw), and Pactel Corporation (PacTel), a subsidiary of Pacific Telesis. MCI Petition at 2. MCI contends that under CMT's proposed tariff, while the balloting procedures conform with the Commission's standards, CMT's method of allocation is inconsistent with the Commission's equal access mandate. *Id.* at 3.

3. CMT replies that MCI's petition is devoid of any merit and urges that it be denied. CMT Reply at 1. In response to MCI's allegation that PacTel has an ownership interest in CMT, CMT states that its ties to PacTel will be severed as of April 1, 1994, pursuant to Commission authority. *Id.* at 1, n.1. Thus, argues CMT, MCI's primary argument regarding CMT's Bell Operating Company heritage is inaccurate and irrelevant. *Id.* CMT contends that the Commission's *Investigation of Access and Divestiture* proceeding addresses equal access procedures only in the wireline context. *Id.* at 2-3, *citing Investigation of Access and Divestiture-Related Tariffs*, CC Docket No. 83-1145, Phase I, 101 FCC 2d 911 (1985). CMT argues that the Commission has never ruled that the policies enunciated in the *Investigation of Access and Divestiture* proceeding apply to wireless carriers. *Id.* at 3.[1]

4. We have reviewed CMT Partners Transmittal No. 1, and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statue or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

5. Accordingly, IT IS ORDERED that the petition to reject, or to suspend and investigate, CMT Partners Tariff F.C.C. No. 2, Transmittal No. 1 filed by MCI Telecommunications Corporation IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] *Id.* MCI has requested that the Commission initiate a rule making to address the equal access obligations of cellular licensees. *See* MCI Telecommunications Corporation, Policies and Rules Pertaining to Equal Access Obligations of Cellular Licensees, Petition for Rule Making, filed June 2, 1992.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

CONTINENTAL MOBILE
TELEPHONE COMPANY, INC.;
CONSOLIDATED DISTILLED
PRODUCTS, INC.; and
LEAVITT COMMUNICATIONS, INC.,
Complainants,

v. File No. E-92-02

CHICAGO SMSA
LIMITED PARTNERSHIP,
Defendant.

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1994; Released: March 16, 1994

By the Commission:

I. INTRODUCTION

1. The Commission has before it an Application for Review of Action Taken Pursuant to Delegated Authority (Application for Review) and a Motion to Hold Discovery in Abeyance or, in the Alternative, Assign the Matter to an Administrative Law Judge (Motion), filed by the defendant in the above-captioned proceeding, Chicago SMSA Limited Partnership (CSLP). CSLP asks the Commission to set aside a ruling by the Acting Chief, Enforcement Division, Common Carrier Bureau (Bureau) that denied CSLP's motion to dismiss the captioned complaint for lack of subject matter jurisdiction. *See Continental Mobile Telephone Company, Inc. v. Chicago SMSA Limited Partnership*, 7 FCC Rcd 2675 (Com. Car. Bur. 1992) (hereinafter *MO&O*). For the reasons set forth below, we deny the application for review and dismiss as moot the motion to hold discovery in abeyance. We also deny CSLP's alternative request that we designate this matter for evidentiary hearing.

II. BACKGROUND

2. On October 8, 1991, the complainants, Continental Mobile Telephone Company, Inc., Consolidated Distilled Products, Inc., and Leavitt Communications, Inc., filed a formal complaint alleging that CSLP had violated Sections 201(b) and 202(a) of the Communications Act[1] and the Commission's policies prohibiting restrictions on the resale of cellular service. [2] Complainants are resellers of cellular communications services in the Chicago area and purchase such services for resale purposes from CSLP. The crux of complainants' claim is that CSLP has refused to permit complainants to take service at the same discounted or wholesale rates that CSLP offers to its own cellular customers. On December 9, 1991, CSLP filed an answer denying the allegations and a motion to dismiss the complaint. CSLP argued, *inter alia*, that the Commission has no authority to entertain the complaint because it involves a dispute about rates for local exchange service -- in this case cellular service -- a matter CSLP claimed is within the sole purview of state regulation. In the *MO&O*, the Bureau ruled that the complainants had stated a cause of action under the Act by alleging that CSLP had violated the Commission's resale policies by offering discount rates to certain customers that were lower than the rates for the same service provided to complainants for resale.[3] The Bureau denied CSLP's motion to dismiss insofar as it sought dismissal of the complaint on jurisdictional grounds.[4]

III. CONTENTIONS OF THE PARTIES

3. In its application for review, CSLP reiterates its claim that the complaint is really an action requesting the Commission to find CSLP's cellular rates unlawful and to retroactively adjust those rates through an award of damages.[5] CSLP argues that the Bureau's conclusion that the Commission has authority to inquire into rates and practices of cellular carriers for purposes of addressing alleged violations of the Commission's resale policies is inconsistent with Sections 2(b) and 221(b) of the Act, 47 U.S.C. §§ 152(b) and 221(b), and court and Commission rulings interpreting these provisions.[6] According to CSLP, these statutory provisions expressly preclude the Commission from asserting jurisdiction over local exchange and intrastate service rates.[7] CSLP argues that the Bureau's rationale that such jurisdiction is necessary to the effective enforcement of the Commission's cellular resale policy represents a flawed attempt to justify jurisdiction where none exists as a matter of law.[8] CSLP characterizes the alleged inability of the Commission to regulate cellular rates and practices as "an unfortunate consequence of Congress' division of regu-

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[1] Section 201(b), 47 U.S.C. § 201(b), proscribes any unjust or unreasonable charge, practice, classification, or regulation for or in connection with interstate or foreign communication by a common carrier. Section 202(a), 47 U.S.C. § 202(a), makes it unlawful for any carrier engaged in interstate or foreign communication by wire or radio to "make any unjust or unreasonable discrimination in charges, practices, classifications, regulations, facilities, or services for or in connection with like communication service."

[2] *See* Cellular Communications Systems, 86 FCC 2d 469, 511 (1981), *recon.* 89 FCC 2d 58 (1982), *further recon.* 90 FCC 2d 571 (1982), *pet. for rev. dismissed sub nom.* U.S. v. FCC, No. 82-1526 (D.C. Cir. March 3, 1983); *see also* Petitions for Rulemaking Concerning Proposed Changes to the Commission's Cellular Resale Policies, 6 FCC Rcd 1719, 1724 (1991), *Report and Order*, 7 FCC Rcd 4006 (1992), *aff'd. on other grounds sub nom. Cellnet Communications v. FCC*, 965 F.2d 1106 (D.C. Cir. 1992) (*Cellular Resale Policies*).

[3] *MO&O*, 7 FCC Rcd at 2675.

[4] *Id.* The Bureau deferred ruling on other issues raised in the motion to dismiss pending further discovery proceedings.

[5] Application for Review at 2-3.

[6] *Id.* at 4-6.

[7] *Id.*

[8] *Id.* at 4-5.

latory jurisdiction.[9] CSLP argues that only Congress can confer such power on the Commission and that it has not done so.

4. CSLP next contends that even if the Commission determines that it has jurisdiction over the complaint, it should designate the complaint for evidentiary hearing before an Administrative Law Judge. According to CSLP, "many factual issues will have to be resolved and an Administrative Law Judge will be able to conduct proceedings much more efficiently."[10] CSLP does not, however, specify or describe any factual disputes that exist at this stage of the proceeding.

5. In their opposition to the application for review, complainants contend that CSLP mischaracterizes their complaint as well as the issue presented by the application for review. The issue, complainants contend, is whether the Bureau properly concluded that the Commission has jurisdiction to adjudicate complaints alleging that a cellular licensee's conduct violates the Commissions's cellular resale policy.[11] Complainants state that the crux of their complaint is that CSLP has established and promoted preferential rate packages for select, high-volume customers and that these packages are comprised of several elements such as monthly access, air-time or usage, and custom calling or enhanced features, which are offered at rates that are discounted relative to the rates CSLP charges complainants for the same services.[12] The complainants maintain that their complaint does not challenge the manner in which CSLP selected the constituent rate elements or rate levels but is "grounded simply and exclusively in the discriminatory manner in which CSLP offers these rate packages to customers."[13] Complainants argue that because this kind of discrimination is precisely what the cellular resale policy forbids, their complaint is plainly within the Commission's jurisdiction.[14]

IV. DISCUSSION

6. We have carefully reviewed the arguments presented by the parties and find no reason to disturb the Bureau's ruling. At the outset, we note that CSLP does not dispute that the Commission has established a requirement that cellular carriers permit resellers to take service on the same terms and conditions, including wholesale or discount rates and charges, as any other cellular customer. Indeed, CSLP affirmatively acknowledges the existence of this policy in the numerous pleadings it has filed in this proceeding.[15] Further, CSLP does not deny that it offers certain customers wholesale or discounted rates that are not available to complainants for the same services. Nevertheless, it makes the claim that the Commission has no authority to "enforce" or "protect" the policy by examining alleged discriminatory rates or practices insofar as local or intrastate rates and practices are involved.

7. The Communications Act grants parties the right to file complaints against carriers and authorizes the Commission to award damages if the complainant can establish that a carrier violated the Act or a Commission order or rule and that the complainant sustained damage as a consequence of such violation.[16] Under the Commission's rules, all that is required to make out a *prima facie* case in a complaint proceeding is a filing containing "facts which, if true, are sufficient to constitute a violation of the Act or Commission order or regulation."[17] Contrary to CSLP's claims, the question presented by complainants in this Section 208 proceeding is not CSLP's rates or rate levels *per se*, but whether CSLP's cellular offerings are in compliance with Commission orders and decisions prohibiting unreasonable restrictions on cellular resale. As the Bureau aptly noted in its *MO&O*, the case that complainants present is straightforward. The action they allege CSLP has performed in contravention of the Act and Commission orders is to refuse to provide service to complainants on the same terms and conditions as other cellular customers. CSLP's contention that this Commission lacks the requisite authority to adjudicate such claims simply has no merit. In this regard, we believe that imposing our cellular resale policy on each of the two cellular licensees in each market was well within our Title III jurisdiction over spectrum allocation and licensing matters.[18] Accordingly, we deny the Application for Review.[19]

8. We also deny CSLP's alternative request that we designate this matter for evidentiary hearing before an Administrative Law Judge. Section 208 of the Act does not mandate any particular form of procedure in complaint

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[9] *Id.* at 6-7.
[10] Motion at 5-7.
[11] Opposition at 2-3.
[12] *Id.* at 5-6.
[13] *Id.*
[14] Both CSLP and complainants cite a number of Commission and court decisions to support their respective claims. CSLP relies principally upon the Supreme Court decision in Louisiana Public Service Commission v. FCC, 476 U.S. 355 (1986) (hereinafter *Louisiana PSC)* and the Court of Appeals decision in California v. FCC, 798 F.2d 1515 (D.C. Cir. 1986) (hereinafter *California),* for the proposition that claims regarding the rates and practices of cellular carriers encroach on state authority and are beyond the Commission's jurisdiction. Complainants counter that neither case is applicable to the issues raised by their complaint. Complainants state that in *Louisiana PSC*, the Supreme Court barred the Commission from preempting state authority by dictating the level of depreciation expense to be used in computing local exchange rates, while the court in *California* held that the Commission's Title II jurisdiction does not provide an adequate basis for a blanket preemption of state regulation of intrastate common carriers. Complainants argue that because enforcement of the cellular resale policy is not inconsistent with state regulation of cellular rates, the relief sought in their complaint fails to encroach on state authority. Complainants add that the Commission has acted to enforce its cellular resale policy in several complaint cases decided after *Louisiana PSC* and *California*. *See* Opposition at 10 (citing Cellular Marketing, Inc. v. Houston Cellular Telephone Company, 4 FCC Rcd 6667 (Com. Car. Bur. 1989); TRAC Communications v. Detroit Cellular Telephone Co., 4 FCC Rcd 3769 (Com. Car. Bur. 1989); Cellular Telephone Co., 3 FCC Rcd 6274 (Com. Car. Bur. 1988)).
[15] *See, e.g.*, Answer of CSLP at 6, 15.
[16] 47 U.S.C. §§ 206-209.
[17] 47 C.F.R. § 1.720(b).
[18] *See Cellular Resale Policies*, 7 FCC Rcd at 4006 (Resale restrictions imposed as a condition pursuant to Section 309 of the Act, 47 U.S.C. § 309).
[19] CSLP's motion to hold discovery in abeyance pending our decision on CSLP's Application for Review is now moot in light of our action in this Memorandum Opinion and Order.

cases.[20] Indeed, when Section 208 is construed in conjunction with the Act's general procedural authorization in Section 154(j), it is clear that the Commission, or the Bureau pursuant to delegated authority, has the discretion to determine whether trial-type hearings are necessary under Section 208.[21] In any event, CSLP has failed to identify any material, disputed question of fact at this stage of the proceeding that would warrant the trial-type hearing it seeks.[22]

V. ORDERING CLAUSES

9. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), that CSLP's Application for Review, filed April 22, 1992, IS DENIED to the extent indicated above.

10. IT IS FURTHER ORDERED that CSLP's Motion to Hold Discovery in Abeyance Or, In the Alternative, Assign the Matter to an ALJ, filed April 22, 1992, IS DISMISSED as moot to the extent indicated above and otherwise IS DENIED.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[20] Section 208 provides that the Commission has the duty to investigate any complaint properly filed under the section "in such manner and by such means as it shall deem proper."

[21] *See, e.g.*, Comark Cable Fund III, 100 FCC 2d 1244, *recon. denied*, 103 FCC 2d 600, *temporarily stayed*, 104 FCC 2d 451 (1985), *remanded for clarification sub nom.* Northwestern Indiana Telephone Co. v. FCC, 824 F.2d 1205 (D.C. Cir. 1987) (*Northwestern Indiana*), *clarified on remand*, 3 FCC Rcd 3096 (1988), *pet. for review denied*, 872 F.2d 465 (D.C. Cir. 1989), *pet. for rehearing en banc denied* (D.C. Cir. June 27, 1989).

[22] *See Northwestern Indiana, supra.*

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

DIANNE FEINSTEIN,
JOHN SEYMOUR, THOMAS HAYES,
et. al

Against Station KABC-TV
Los Angeles, California

ORDER

Adopted: March 18, 1994; Released: March 18, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed May 29, 1992, on behalf of the following: Dianne Feinstein, John Seymour, Thomas Hayes, John Van De Kamp, Pete Wilson, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, Dan Lungren, Arlo Smith, Conway Collis, and Matthew Fong (hereinafter, collectively, "Complainants"). Complainants allege that television Station KABC-TV, Los Angeles, California, overcharged them during the 1988 and/or 1990 elections in violation of the requirements of Section 315(b) of the Communications Act of 1934, as amended.[1] Feinstein was a legally qualified candidate for nomination and election for Governor of the State of California for the June 5, 1990, primary and November 6, 1990, general election; Hayes was a legally qualified candidate for nomination and election for Treasurer of the State of California for the 1990 primary and general election; Seymour and Milke-Flores were legally qualified candidates for nomination for Lieutenant Governor of the State of California for the 1990 primary; Van De Kamp was a legally qualified candidate for nomination for Governor of the State of California for the 1990 primary; Wilson was a legally qualified candidate for nomination and election for Governor of the State of California for the 1990 primary and general election, and he was also a legally qualified candidate for nomination and election to the United States Senate for the June 7, 1988, primary and November 8, 1988, general election; Bergeson was a legally qualified candidate for nomination and election for Lieutenant Governor of the State of California for the 1990 primary and general election; McCarthy was a legally qualified candidate for nomination and election for Lieutenant Governor of the State of California for the 1990 primary and general election, and he was also a legally qualified candidate for nomination and election to the United States Senate for the 1988 primary and general election; Lungren and Smith were legally qualified candidates for nomination and election for Attorney General of the State of California for the 1990 primary and general election; Collis was a legally qualified candidate for nomination for Insurance Commissioner of the State of California for the 1990 primary; and Fong was a legally qualified candidate for nomination and election to the Board of Equalization for the State of California for the 1990 primary and general election. The Bureau also has before it an answer to the complaint filed on February 1, 1993, by Capital Cities/ABC, Inc., licensee of station KABC-TV (hereinafter, "KABC").[2]

2. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) ("*Declaratory Ruling*") , to the information presented, we find that complainants Feinstein, Hayes, and Seymour have established a *prima facie* case of a violation by Station KABC-TV of the lowest unit charge ("LUC") requirement of Section 315(b)(1) of the Communications Act with respect to the period immediately preceding the June 5, 1990, primary. Complainants Van De Kamp, Wilson, Bergeson, McCarthy, Milke-Flores, Lungren, Smith, Collis, and Fong have failed to establish a *prima facie* case of an LUC violation, and therefore their complaints against KABC-TV will be dismissed. All complainants failed to establish a *prima facie* case with respect to allegations that KABC did not provide candidates with all discount rates and privileges, impermissibly increased the rates charged to candidates, discriminated between candidates with respect to rates, and overcharged candidates during the comparable use period. Accordingly, these claims are dismissed. Following is a discussion of the Bureau's findings with respect to all the issues raised, and a timetable and procedures for discovery, post-discovery, and election of a procedure for resolving those portions of this complaint presenting a *prima facie* case.[3]

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[1] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

[2] On March 5, 1993, Complainants filed a Request for Leave to Supplement Complaint, and on March 17, 1993, KABC filed a Response thereto. Complainants point out that their complaint relies, in part, upon cost per point Spot Quotations and Data, Inc. ("SQAD") and Spot Cost Outlook and Projections ("SCOOP") data. Complainants further note that, in *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, n.8 (1992), which was released *after* the complaint was filed, the Commission cautioned complainants in the future to provide more precise information regarding the manner in which such data was used to establish a *prima facie* case. Complainants' supplement provides such information, and we believe it will assist us in the resolution of this matter. Accordingly, complainants' request for leave to supplement complaint is granted.

[3] The complaint also alleges that KABC violated the Commission's political file requirements. However, this *Order* is pursu-

Overcharge Allegations

3. Complainants allege that records regarding commercial advertising indicate that KABC overcharged candidates. Cited as examples are costs for spots sold to the California Lottery, a commercial advertiser, on May 14 and 22, 1990, and, by way of comparison, costs for spots sold in the same day parts to complainants Van De Kamp and Feinstein. Complainants do not identify the length and class of the spots, nor do they provide contracts, invoices, or other documentation relative to the candidates' spots which would indicate that the spots sold to them are the same length and class as those sold to the California Lottery. KABC's answer asserts that the difference in cost is attributable to differences in length or class of the spots.

4. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. A complainant must describe the specific factual basis for its belief that a station has committed a violation, rather than, for example, merely making a general allegation that a station has overcharged candidates. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) (*"Chiles"*). Here, complainants' only factual allegations concern spots purchased by Van De Kamp and Feinstein. Even as to them, complainants have failed to show the length and class of the spots purchased. The LUC requirements of Section 315(b)(1) are limited to advertising of the same amount of time and class. *See also* Section 73.1942(a)(1) of the Commission's Rules. By failing to indicate the length and class of spots they purchased, complainants make it impossible to compare their spots with commercial advertising of the same length and class. Thus, complainants have not described a specific factual basis for their allegations.

5. The complaint also relies on generally-available industry or statistical data to show that KABC overcharged candidates. In its answer, KABC argues that marketwide cost per point projections are not representative. We note, however, that in the *Declaratory Ruling*, at n.47, the Commission specifically endorsed the use of generally-available industry or statistical data on average rates, such as Spot Quotations and Data, Inc.("SQAD") and Spot Cost Outlook and Projections ("SCOOP"), to make a *prima facie* case of an LUC violation. Complainants state that second-quarter SCOOP rates, based on May 1990, ratings, are lower than rates charged candidates.[4] . The complaint does not indicate which candidates were overcharged and for which spots. Instead, complainants provide a comparison of SCOOP rates with rates on KABC-TV's political rate card for the period preceding the primary of June 5, 1990. In addition, complainants state their understanding that volume advertisers attempt to purchase spots at 30% lower than the SCOOP average rates.

6. As KABC points out in its answer, there is no basis for discounting SCOOP rates by 30% and we will not assume the existence of such discounted rates. *See Chiles* at 6662-63. With regard to comparisons with the full SCOOP rate, although the complaint fails to state which candidates were actually charged more than the SCOOP rate, we have analyzed the contracts and invoices appended to the complaint in order to determine the rates paid by complainants. We have limited our analysis to the period preceding the June 5, 1990, primary because the SCOOP rates relied upon by the complainants were for May 1990, only, and because the political rate card rates with which complainants compared those SCOOP rates are for the period preceding the primary. As the supplement to the complaint explains, SCOOP rates were compiled by multiplying a cost-per-point factor by KABC's own ratings points for specific time periods to arrive at a station-specific average rate. Based on our analysis, we find that complainants Feinstein, Seymour, and Hayes have established a *prima facie* case of a violation of the Commission's LUC requirement. The rates paid by them for use of KABC-TV's facilities during the forty-five days preceding the June 5, 1990, primary were frequently higher than the SCOOP rates. There is no indication that the other complainants paid higher rates than the SCOOP rate. Based on this *prima facie* showing, we believe that further fact finding is warranted to determine whether complainants Feinstein, Seymour, and Hayes were overcharged by KABC. For the reasons set forth above, complainants' *prima facie* case is limited to the period preceding the 1990 primary. Thus, no further fact finding is warranted with regard to other time periods.

7. Complainants also claim that KABC discriminated against candidates in its charges for 10-second spots. The complaint does not describe a single instance of actual overcharging. Rather, the complainants assert that KABC's political rate card gives a rate for 10-second announcements of 60% of the 30-second rate. Complainants go on to claim that the California Lottery purchased 10-second spots at less than 60% of the 30-second rate. We find that the complaint fails to make a *prima facie* showing of overcharges on 10-second spots.

8. Although the complaint appends 1988 contracts and invoices for the California Lottery, the only political rate card complainants provide is for the period between April 21 and June 5, 1990. Because information about rates charged candidates in 1988 is not provided, it is impossible to make any comparison between rates charged to the California Lottery and to candidates for 10-second spots in 1988.[5] Further, although 1990 contracts and invoices for the California Lottery, and a 1990 political rate card are provided, no information is supplied concerning the rates actually charged candidates for 10-second spots in 1990. Thus, without data on the rates actually charged, it is not possible to determine the LUC. In sum, complainants have not made a *prima facie* showing that any candidate was charged more for a 10-second spot than was a commercial advertiser.

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ant to procedures for a *prima facie* analysis as set forth in *Declaratory Ruling*, and allegations of violation of political file requirements are not subject to those procedures. Thus, alleged political file violations by KABC will not be addressed herein.

[4] A supplement to the complaint states that use of SQAD rates in the complaint was erroneous. The supplement also indicates that SCOOP data for the second quarter of 1990 was used and the methodology employed. *See* n.2, *supra*. Accordingly, we will limit our analysis herein to SCOOP data for that time period.

[5] Because we are dismissing this aspect of the complaint, we need not reach the question of whether the complaint is untimely with respect to charges in 1988.

Failure to Make Discount Rates and Privileges Available

9. Complainants argue that KABC did not provide candidates with all discount rates and privileges available to other advertisers. We conclude that complainants have not made a *prima facie* showing in this regard. First, the complaint asserts that KABC refused to sell time to candidates at intermediate rates.[6] Complainants do not provide any specific indication of a refusal to sell at intermediate rates to any one of the complainants. Moreover, the complaint does not show that commercial advertisers received the reduced rates. Finally, the political rate card appended to the complaint, which is for the period preceding the 1990 primary, includes hand-written numerical notations, which KABC's answer claims to be intermediate rates made available by KABC.[7] In sum, the complaint makes no showing, save its bald assertion to that effect, to support the allegation that intermediate rates were not available to candidates.

10. The complaint also alleges that KABC violated the Communications Act by failing to guarantee separation of spots to candidates. However, separation of spots is irrelevant to the issue of lowest unit charge. *Lawton Chiles, Bob Martinez, Bill Nelson and Jim Smith (WCIX-TV)*, 8 FCC Rcd 4019, 4023 (MMB 1993).

Allegations Concerning Rate Increases

11. Complainants claim that KABC impermissibly increased its preemptible and fixed rates during the general election period in 1990. The complaint does not cite any specific examples of such increases. Complainants argue that it is KABC's policy, according to *Spot Television Rates and Data*, to provide rate protection to its commercial advertisers, so that candidates are penalized *vis a vis* advertisers who buy spots over a longer period of time. The complaint offers no factual support whatsoever for this proposition. KABC's answer denies that rates were increased beyond the usual and customary increase between the 3rd and 4th quarter. The only invoice provided by complainants for advertising purchased by any of them during the general election period is for spots sold to complainant Marian Bergeson. Our analysis of that invoice does not reveal an unreasonable increase over the rates included in KABC's political rate card governing the period preceding the 1990 primary. The Commission has long recognized that a station can increase its rates as the result of its normal business practices. *See Public Notice, Licensees and Cable Operators Reminded of Lowest Unit Charge Obligations*, 4 FCC Rcd 3823 (1988). Had there been long term commercial contracts, candidates would have been entitled to such benefits. *See Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678, 693-94 (1991); *Public Notice, The Law of Political Broadcasting and Cablecasting*, 690 FCC 2d 2209, 2271 (1978); *Public Notice, Use of Broadcast and Cablecast Facilities by Candidates for Public Office*, 34 FCC 2d 510, 528-29 (1972). Here, complainants did not even allege that the long term commercial rates were excluded from the station's LUC calculations or that candidates paid more than *any* commercial advertiser -- long term or not -- for similar spots. We find prima *facie* case with respect to their allegation that KABC impermissibly raised its rates.

Alleged Rate Discrimination

12. The complaint claims that KABC discriminated in the advertising rates which it charged different candidates, in violation of Section 73.1941(e) of the Commission's Rules. 47 C.F.R. Section 73.1941(e). Complainants cite several examples of different rates charged two different candidates for advertising during the same day parts. However, the complaint does not indicate the length and class of the spots. In its answer, KABC states that the difference in rates between the candidates is attributable to differences in the length or class of the spots. Clearly, if the spots are of different length or class, rate distinctions do not amount to discrimination. Because complainants have not provided information as to length and class, they have failed to establish a *prima facie* case with respect to rate discrimination.

Alleged Comparable Use Overcharges

13. Complainants allege that KABC violated the comparable use provision of the Communications Act, Section 315(b)(2). That provision governs charges for political advertising during the period outside of the forty-five days preceding a primary and the sixty days preceding a general election. Specifically, the Act requires stations to charge a candidate no more than the rate charged other advertisers for a comparable use.

14. The complaint does not provide a comparison of rates charged complainants and rates charged other advertisers. Instead, complainants merely assert that, during the comparable use period, candidates paid rates similar to the fixed rates offered during the LUC period. Because rates "this high" are rarely charged commercial advertisers, complainants insist, they cannot be considered comparable. Without a comparison of rates charged commercial advertisers who are similarly situated for advertising of the same length and class and candidates during the comparable use period, it is impossible to determine whether or not complainants were charged a comparable rate. Complainants do not provide this comparison, nor any other factual support for their allegations. A bare allegation, without more, is insufficient to establish a *prima facie* case of overcharges.

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[6] While the complaint alleges that KABC did not offer preemptible rates to candidates until "pushed," complainants concede that, ultimately, at least, KABC did make preemptible rates available to candidates. Indeed, complainants attach a letter dated April 16, 1990, more than forty-five days before the 1990 primary, evidencing KABC's agreement to sell spots at preemptible rates. The LUC requirements of the Communications Act were not applicable on the date of the letter. Thus, we will consider the complaint as objecting to the alleged unavailability of intermediate rates, *i.e.*, rates between preemptible and fixed rates.

[7] The political rate card provided pre-dates the requirement that, if a political rate card is used, it must include every level of preemptibility available to other advertisers. *Political Programming Audit*, 68 RR 2d 113, 116 (MMB 1990).

Timetable and Procedures for Discovery

15. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See* 6 FCC Rcd at 7513-14, 7521, n.49. *See also, Chiles*, 7 FCC Rcd at 6665. Accordingly, we will allow complainants Dianne Feinstein, John Seymour and, Thomas Hayes limited discovery on the issue of overcharges during the 45 days before the June 5, 1990 primary. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for complainants Feinstein, Seymour and Hayes (not the Commission) by KABC on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

16. Any request for further discovery by complainants Feinstein, Seymour, and Hayes must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by KABC for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for KABC to respond to arguments or claims that could be made by complainants Feinstein, Seymour, and Hayes in their amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[8] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

17. Documents produced by KABC that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, the name(s) of any person employed by the advertiser, and the name of any media company or agency representing the commercial advertisers and any persons employed by such media company or agency. Where any such information is redacted, the station shall advise complainants Feinstein, Seymour, and Hayes of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should complainants Feinstein, Seymour, and Hayes serve documents upon the station, they may redact proprietary information and so advise the station of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

18. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp.

19. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to complainants Feinstein, Seymour, and Hayes, the management of KABC, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission.

20. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

21. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

22. Within 30 days after completion of discovery, complainants Feinstein, Seymour, and Hayes must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After KABC has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

23. Settlement of lowest unit charge claims is encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

24. ACCORDINGLY, we find that a *prima facie* case of a violation of the Commission's lowest unit charge requirement has been established by complainants Dianne Feinstein, John Seymour, and Thomas Hayes in connection with advertising aired on their behalf during the 45 days before the June 5, 1990, primary. The parties are hereby

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[8] *See Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require the party seeking depositions to demonstrate with respect to *each* witness they seek to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific* " arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

ORDERED to follow the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

25. We find that a *prima facie* case of a violation of the lowest unit charge requirement has not been made with regard to the 60-day period preceding the November 6, 1990, general election. Accordingly, these claims are DISMISSED as to all complainants. We further find that a *prima facie* case with respect to a violation of the lowest unit charge requirement has not been made by complainants John Van De Kamp, Pete Wilson, Marian Bergeson, Leo McCarthy, Joan Milke-Flores, Dan Lungren, Arlo Smith, Conway Collis, and Matthew Fong. Therefore, their complaint against KABC is hereby DISMISSED. Finally, we find that complainants failed to establish a *prima facie* case with respect to allegations that KABC did not provide candidates with all discount rates and privileges, impermissibly increased the rates charged to candidates, discriminated between candidates, and overcharged candidates during the comparable use period. Thus, these claims are DISMISSED as to all complainants.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANTS FEINSTEIN, SEYMOUR, AND HAYES

Certain documents shall be produced to complainants Feinstein, Seymour, and Hayes by KABC by delivering them to the offices of Barnes, Browning, Tanksley & Casurella, 166 Anderson Street, Suite 225, Marietta, Georgia 30060 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary election.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary election.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on KABC-TV beginning on April 22, 1990 and running through June 5, 1990 (the 45 days preceding the relevant primary election).

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during this period;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during this period, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during this period; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during this period.

4) All documents used by KABC to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions of Section 315(b) of the Communications Act. This should include any written policy statement(s) used by KABC-TV in 1990 which directly or indirectly related to KABC-TV's pricing policies.

5) All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of KABC-TV with respect to the 1990 primary election, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by KABC-TV in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS FEINSTEIN, SEYMOUR AND HAYES

Answers to the following interrogatories shall be provided to complainants Feinstein, Seymour, and Hayes in accordance with the procedures set forth in this *Order:*

1) Describe how KABC-TV arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by KABC-TV to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at KABC-TV, and should identify all documents which refer to or formed a part of KABC's efforts to ensure that candidates received the LUC.

3) Provide a statement that indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time period.

4) Provide a statement that explains any codes used by KABC-TV or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period:	Day 1
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	Day 1
Request by complainants Feinstein, Seymour, and Hayes for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by KABC to complainants Feinstein, Seymour, and Hayes' request for further discovery due:	Day 20
KABC's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by complainants Feinstein, Seymour, and Hayes to KABC's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to KABC's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to complainants Feinstein, Seymour, and Hayes' request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainants Feinstein, Seymour, and Hayes' amended complaint due:	Day 90
KABC's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

HARVEY SLOANE

Against Station WTVQ-TV
Lexington, Kentucky

ORDER

Adopted:March 16, 1994; Released: March 18, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed February 4, 1993, on behalf of Dr. Harvey Sloane, and an answer filed March 4, 1993, by Shamrock Broadcasting, Inc. ("Shamrock"), former licensee of television Station WTVQ-TV, Lexington, Kentucky.[1] Dr. Sloane alleges that the station overcharged him during the 1990 elections in violation of the lowest unit charge ("LUC") requirement of Section 315(b) of the Communications Act of 1934, as amended.[2] Dr. Sloane was a legally qualified candidate for nomination and election for United States Senator for the Commonwealth of Kentucky for the May 29, 1990, primary and the November 6, 1990, general elections. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that Dr. Sloane's complaint is untimely and should be dismissed.

2. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. However, the *Declaratory Ruling*, 6 FCC Rcd at 7521 n.46, also stated that Section 315(b) complaints should be filed with the Commission in a timely manner.

3. Dr. Sloane first questioned Shamrock about possible overcharges during the 1990 primary and general elections by letter dated March 28, 1991, when Shamrock was still licensee of Station WTVQ-TV. Shamrock reviewed its records and determined that Dr. Sloane was entitled to a refund of $450, which it sent to Dr. Sloane by letter dated May 20, 1991. Shamrock heard nothing further from Dr. Sloane. On November 18, 1991, Shamrock and Park filed an application to assign the license of Station WTVQ-TV to Park. Public notice of the Commission's action granting Shamrock/Park application was given on December 18, 1991. Dr. Sloane filed nothing. On March 31, 1992, Park filed an application to renew its license for Station WTVQ-TV. Public notice of the Commission's acceptance of that application was given on April 9, 1992. Again, Dr. Sloane filed nothing. Indeed, after having received Shamrock's response in May 1991, there is no indication that Dr. Sloane took any further action until the filing of his complaint in 1993. Thus, Dr. Sloane gave Shamrock no notice that it should retain information regarding its political sales practices at Station WTVQ-TV. In addition, Dr. Sloane has made no showing which suggests that he could not have filed his complaint within the two-year period that licensees are required to retain political files[3] or that he delayed filing his complaint because he had sought but failed to reach a negotiated settlement with the licensee. Given these circumstances, particularly the sale of the station, we see no reason to address the merits of Dr. Sloane's complaint or have Shamrock search through records it was no longer required or could reasonably have been expected to retain.

4. ACCORDINGLY, we find that Dr. Sloane has filed an untimely Section 315(b) complaint. Therefore, the complaint against Shamrock, former licensee of Station WTVQ-TV, Lexington, Kentucky, is hereby DISMISSED.

5. IT IS FURTHER ORDERED, that the complaint against Park, licensee of Station WTVQ-TV, Lexington, Kentucky, is hereby DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Shamrock was licensee of Station WTVQ-TV until January 29, 1992, at which time the license for the station was assigned to Park Broadcasting of Kentucky, Inc. ("Park"). See File No. BALCT-911118KG, granted December 18, 1991. Sloane originally directed his complaint against Park on January 19, 1993. On January 29, 1993, Park moved to dismiss Sloane's complaint on the ground that it was not the licensee of the station at the times of the alleged overcharges. In light of Sloane's failure to respond to Park's motion and his subsequent filing against the former licensee, we will dismiss Sloane's complaint against Park.

[2] Section 315(b)(1) provides as follows:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period ....

47 U.S.C. Section 315(b)(1). *See also* 47 C.F.R. Section 73.1942(a).

[3] *See* Section 73.1943 of the Commission's Rules.

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

LAWTON CHILES, BOB MARTINEZ,
and BILL NELSON

Against Station WTVT(TV),
Tampa, Florida

ORDER

Adopted: March 18, 1994; Released: March 18, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it an amended complaint filed March 3, 1993, on behalf of the following: Lawton Chiles, Bob Martinez, and Bill Nelson (hereinafter "Complainants"). Complainants allege that television Station WTVT(TV), Tampa, Florida, overcharged them during the 1990 elections in violation of the requirements of Section 315(b) of the Communications Act of 1934, as amended.[1] Complainants were legally qualified candidates for Governor of the State of Florida. Chiles and Martinez were candidates for nomination and election for Governor for the September 4, 1990, primary and November 6, 1990, general election, and Nelson was a candidate for nomination for Governor in the primary. The Bureau also has before it an answer to the amended complaint filed on March 24, 1993, by WTVT License, Inc., licensee of station WTVT(TV) (hereinafter, "WTVT").

2. Pursuant to the procedures set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992)(*"Declaratory Ruling"*), the Bureau issued an *Order*, which found that the above-referenced Complainants had made a *prima facie* case of a violation by WTVT of the lowest unit charge ("LUC") requirements of Section 315(b)(1) of the Communications Act. *Order*, 7 FCC Rcd 6661 (MMB 1992), *aff'd in part, rev'd in part*, 8 FCC Rcd 131 (1992) (affirming finding of *prima facie* case, but limiting scope of discovery). The parties have engaged in limited discovery and Complainants have filed the instant amended complaint, as called for by the *Declaratory Ruling*.

Preliminary Matters

3. In its amended answer, WTVT argues that Section 315(b) deprives WTVT of the protection guaranteed by the Fifth Amendment of the U.S. Constitution. Specifically, WTVT claims that Section 315(b) contemplates the taking of property without just compensation. We believe WTVT's claims are without merit, but, in any event, we will not entertain WTVT's argument because we have no authority to declare an act of Congress unconstitutional. *See Johnson v. Robison*, 425 U.S. 361, 368 (1974); *Meredith Corp. v. FCC*, 809 F.2d 863 (D.C. Cir. 1987).

4. The amended complaint suggests that WTVT's discovery performance in the instant proceeding, alone, mandates adverse findings with respect to each allegation. Without reaching the question of the appropriateness of Complainants' recommended sanction for discovery derelictions, we reject Complainants' suggestion. The amended complaint does not specifically show how WTVT's discovery performance has been lacking, or how Complainants have been harmed thereby. We are not persuaded that WTVT's discovery performance, *per se*, warrants any adverse findings in this proceeding.

Alleged Overcharges for Functionally Preemptible Spots

5. Complainants maintain that all 341 spots which they purchased during the LUC period preceding the 1990 primary should be regarded as preemptible, notwithstanding WTVT's insistence that the spots were sold at the political-fixed rate. According to Complainants, "virtually" every sales contract contained the following language:

> THE RATES PURCHASED ON THE STATION ARE NEGOTIATED RATES AND AS SUCH ARE SUBJECT TO PREEMPTION WITHOUT PRIOR NOTIFICATION. ALL ATTEMPTS WILL BE MADE TO WORK WITH ADVERTISERS IN RE-SCHEDULING LIKE MAKE-GOODS FOR PRE-EMPTED SPOTS, BUT CREDITS MAY BE ISSUED IN CIRCUMSTANCES WHERE MAKE-GOODS CANNOT BE GIVEN.

6. Thus, Complainants argue, their spots could have been preempted and they should have been charged the lowest unit charge for preemptible spots. The amended complaint seeks refunds in unspecified amounts.

7. In its amended answer, WTVT concedes that the language in question was routinely included on most contracts but asserts that its inclusion in Complainants' contracts was an error. In any event, WTVT states that the language had no effect whatsoever on the treatment of spots by the station.

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[1] Section 315(b) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period; and

(2) at any other time, the charges made for comparable use of such station by other users thereof.

47 U.S.C. Section 315(b).

8. We reject this aspect of the amended complaint. Complainants provide no evidence that their spots were actually preempted, or were otherwise treated as preemptible. Moreover, they have not shown that any Complainant was misled into thinking that he was purchasing preemptible spots. Finally, the amended complaint does not set forth the specific overcharges alleged by Complainants.

Alleged Overcharges for Spots of One Class

9. Section 315(b) requires that stations charge candidates, during the 45 days preceding a primary and the 60-day period before a general election, no more than the lowest unit charge for the same class and amount of time for the same period. Thus, if it appears that a station is charging candidates more for what is functionally the same class of time, the station would be in violation of the Commission's LUC requirements.

10. Here, Complainants request unspecified rebates because, although they purchased spots at a separate fixed (*i.e.*, non-preemptible) rate, WTVT was allegedly using a demand rate pricing system based on a one-class grid card. In response to an interrogatory, Mark D. Demopoulos, WTVT's Marketing/Research Manager (hereinafter "Demopoulos") acknowledged that WTVT intended to use a numerical code to determine which spots should be preempted. The full text of Demopoulos' statement makes clear, however, that the system described was never used. In any event, and most importantly, the system was intended to apply to preemptible spots only. Although WTVT concedes its use of a demand rate pricing system, it states that the station's non-preemptible time was neither sold nor handled on the basis of a grid. Thus, non-preemptible time was never subject to the grid card system. Accordingly, it does not follow, as Complainants suggest, that WTVT's pricing system renders all spots one class. Significantly, Complainants have not shown that any of the non-preemptible spots which they ordered was preempted, or was otherwise treated as if it were the same class as a preemptible spot. Accordingly, we will not treat all spots as if they were of one class, and Complainants' arguments in this regard are rejected.

11. Complainants further argue that political fixed (*i.e.*, non-preemptible) spots and preemptible spots were treated as one class by WTVT in one specifically cited time period. Complainant Martinez purchased two spots during the time period in question, one presumably preemptible and one presumably non-preemptible. The presumably preemptible spot was not preempted, although higher priced spots by other advertisers were preempted. Thus, because WTVT has stated that preemption decisions are based on rate alone, Complainants contend that the two spots were actually non-preemptible. That being the case, the lower of the two rates, having established the LUC, should have been charged for both spots. Because Martinez was charged $125 more for the presumably non-preemptible spot, Complainants maintain that he is entitled to a rebate in that amount.

12. WTVT responds that the preemptible Martinez spot should have been preempted and the fact that it was not was an error. We will accept WTVT's explanation. Complainants have not pointed to any other instance where a preemptible spot was not preempted when other higher-priced spots were preempted. We will not order a rebate on the basis of an isolated error which WTVT has admitted. We point out that the error was in favor of Martinez, whose lower-priced spot aired when it should not have.

Alleged Overcharges for Same Dayparts

13. Complainants allege that they are entitled to $7,226.64 in additional rebates from WTVT because they were charged more than the LUC for a given daypart in numerous instances. The amended complaint appends, at Exhibit 3, a listing of the alleged overcharges.

14. In its answer, WTVT concedes that Complainants were overcharged by $1,455.00, and it has issued rebates in the net amount paid by Complainants, *i.e.*, $1,276.35. WTVT disputes the other alleged overcharges listed by Complainants.

15. In several instances, Complainants compare spots of different lengths by using mathematical formulas. For example, Complainants appear to believe that the charge for a 60-second spot purchased by a commercial advertiser should not be more than double the charge to Complainants for a 30-second spot. We agree with WTVT that such comparisons are inappropriate and that the Commission has never adopted such a formula. Indeed, the language of Section 315(b) makes clear that the lowest unit charge is for the same amount of time. Thus, we find no LUC violations in those instances where Complainants have compared spots of different lengths.

16. Moreover, with one exception, we will accept WTVT's explanations for its charges in the other disputed instances.[2] WTVT contends that a Busch spot was appropriately priced lower than a Martinez spot in the 12:30-1:00 PM daypart on October 9, 1990, because Busch purchased a 12:00-1:00 PM rotation and Martinez ordered placement in the specific time period. As discussed more fully below, we are not persuaded that the 12:00-1:00 PM rotation and the 12:30-1:00 PM daypart are distinct time periods for purposes of calculating the LUC. Accordingly, we will order a rebate to Complainant Martinez in the amount of $50.00.

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[2] For example, by means of official logs, WTVT shows that no Circuit City spots aired on November 4 or 5, 1990, in the time periods claimed by Complainants. Likewise, no Matter spot aired in the claimed time period on October 26, 1990. With respect to November 4 and October 26, however, WTVT concedes overcharges, albeit of lesser amounts than claimed by Complainants. WTVT also shows that the Conagra spots of October 25 and November 1, 1990, and the Winn Dixie spot which was broadcast on October 31, 1990, were not aired during the time period claimed by Complainants, *i.e.* during the same time period as Complainants' spots. A Saturn spot of October 25, 1990, was a 30-second spot, not a 60-second spot as claimed by Complainants. With respect to a spot broadcast on behalf of Complainant Chiles on October 28, 1990, at an apparently lower rate than one purchased by Complainant Martinez, WTVT explains that Chiles should have been charged the higher amount to avoid preemption and that the higher amount was factored in to earlier rebates.

Alleged Overcharges for Functionally-Equivalent Dayparts

17. The amended complaint alleges that Complainants have been overcharged in several instances in which they purchased spots in dayparts specifically listed on the general election ratecard. Complainants claim that commercial advertisers purchased lower-priced spots in dayparts which, while not identical, should not have been considered distinct for LUC purposes. The amended complaint compares the cost of spots purchased by Complainants Chiles and Martinez in the 12:00-12:30 PM daypart with that of spots purchased by commercial advertisers in the 12:00-1:00 PM daypart. The amended complaint also provides a comparison with respect to Complainant Chiles' purchases in the 6:00-6:30 PM daypart and commercial advertisers' spots in the 6:00-7:00 PM daypart. Finally, the amended complaint compares charges to Complainant Martinez for spots in the Sunday 9:30-11 AM daypart with charges to commercial advertisers for spots in the Sunday 9:00-10:30 AM daypart.[3]

18. In its answer, WTVT contends that the requirement that rotations be distinctly different before they can be treated as different time periods for LUC purposes first arose in the Commission's December 1991 *Codification of the Commission's Political Programming Policies*, 7 FCC Rcd 678 (1991) (*"Codification"), recon. granted in part, denied in part*, 7 FCC Rcd 4611 (1992). Thus, WTVT argues, the requirement is inapplicable to the 1990 elections. We disagree. Not only is the "requirement" based on logic, it is long standing Commission policy. The *Codification* acknowledged this when it stated "the Commission will *continue* to recognize that distinctly different rotations constitute separate periods of time for purposes of calculating lowest unit charge . . . ." 7 FCC Rcd at 693 (emphasis added).

19. In any event, WTVT argues that its classifications were consistent with the manner in which the station sold time as well as with WTVT's sales practices. In its *Memorandum Opinion and Order* on reconsideration of the *Codification*, 7 FCC Rcd at 4619, the Commission indicated that it would defer to the judgment of a station as to whether there exists a real distinction between rotations "if they correspond to a station's normal commercial sales practices, and are based on *objective* criteria such as varying audience size or demographics, which warrant differences in the prices of rotations." (Emphasis added). The criteria cited by WTVT here to support its distinctions between the rotations at issue are not objective, and we are not persuaded that they warrant differences in price.

20. In a Declaration appended to WTVT's answer, WTVT's Demopoulos states that the 12:00-1:00 PM rotation purchased by commercial advertisers is distinct from the 12:00 -12:30 PM and 12:30-1:00 PM rotations offered to candidates because the former includes a high risk of placement within the 12:30-1:00 PM talk show, which is more controversial than the 12:00-12:30 PM news show. However, in our view, this is not an objective criterion warranting a difference in the price, especially when the 12:30-1:00 PM rotation carries an even higher risk, 100%, of placement during the 12:30-1:00 PM show.

21. Similarly, Demopoulos' explanation for the distinction between the 6:00-7:00 PM rotation and the 6:00-6:30 PM rotation is also rejected. Both time periods consisted of news programs, and WTVT does not cite any objective criteria, such as ratings, to support its apparent argument that the likelihood of placement during the 7:00 PM break is more desirable.

22. Likewise, we reject WTVT's justification for treating the Sunday 9:30-11:00 AM rotation differently from the 9:00-10:30 AM rotation. It is unavailing that the latter time period has double the inventory of time of the first. It is not clear what value this would impart to the spot *for the advertiser*. As the Commission stated in the *Codification*, "*[d]istinctly* different rotations are rotations that have meaningful differences in value to an advertiser." 7 FCC Rcd at 693.

23. The requirement that different rotations be based on meaningful differences in value to an advertiser, based on objective criteria, is not a mere technicality. Unfettered licensee discretion to define differences in rotations has the potential of making a mockery of LUC requirements, for a licensee could avoid those requirements by creating artificially distinct rotations. That concern is heightened where, as here, candidates apparently were not afforded the option to purchase time during the less expensive rotations that were made available to commercial advertisers.

24. Because we thus find that WTVT overcharged candidates during functionally equivalent dayparts, we will order WTVT to issue rebates to Complainants Chiles and Martinez. Complainant Chiles has shown that he was overcharged by $500.00 and Complainant Martinez has shown that he was overcharged by $625.00.[4]

Alleged Failure to Factor in No-Charge Spots

25. If a station offers bonus (*i.e.* free) spots to an advertiser under certain circumstances, those spots must be factored into the computation of the rate per spot charged the advertiser. *1984 Political Primer*, 100 FCC 2d 1476, 1517 (1984). However, the Commission will permit stations to exclude from their bonus spot calculations any bonus spots or make goods furnished to meet contracted-for promises of certain audience numbers, demographics, ratings, etc. *See Further Discovery Order* in this proceeding, 8 FCC Rcd 714, 716 (MMB 1993).

26. Complainants allege that WTVT failed to take bonus spots into account in calculating the LUC. WTVT responds that the bonus spots cited by Complainants were properly excluded from LUC calculations, and we agree. All but one of the spots was provided to compensate an advertiser for earlier audience underdelivery. One of them was offered in trade. For the reasons set forth below, bonus spots offered in trade are excluded from LUC calculations.

27. Complainants maintain that WTVT offered bonus spots in trade, and thus, that Complainants should have received their spots, broadcast in similar dayparts, for free[5]

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[3] No other overcharges to any other complainant or for any other daypart are specifically set forth.

[4] This rebate is in addition to the $50.00 rebate due Martinez pursuant to the preceding discussion.

[5] We wish to point out that there is no policy whereby a bonus spot would itself establish the LUC. Thus, although bonus spots may have to be taken into account in calculating the LUC in certain circumstances, *i.e.*, by including the no-charge in deter-

or for a greatly reduced price. Specifically, Complainants point to spots run on behalf of Vail-Beaver Creek ski resorts, then commonly-owned with WTVT.

28. It is well settled that "trade-out" or barter deals not involving cash payments need not be taken into account in calculating the LUC. *1984 Political Primer,* 100 FCC 2d 1476, 1517 (1984). Thus, WTVT is correct when it responds that it was not required to factor into its LUC calculations the no-charge Vail-Beaver Creek spots. In sum, Complainants have not shown that WTVT violated LUC requirements in their treatment of no-charge spots.

Allegations that "Fixed" not Legitimate Class

29. Complainants allege that "fixed" or "non-preemptible" spots sold to them were not a legitimate class because such rates were neither offered to nor sold to commercial advertisers. In support, the amended complaint states that the terms "fixed" and "non-preemptible" did not often appear on WTVT documents other than political rate cards and contracts. Complainants maintain that the term "fixed" first appeared in WTVT's commercial records after the release of *Mass Media Bureau Report on Political Programming Audit,* 68 RR 2d 113 (MMB 1990), on September 7, 1990.

30. In its answer, WTVT correctly points out that the Commission did not clarify until after the 1990 Florida primary that a higher-priced non-preemptible rate could be charged political advertisers only if such a class of spots was also made available to commercial advertisers (even if no commercial advertisers actually bought that class of time.) *Codification of the Commission's Political Broadcasting Policies,* 7 FCC Rcd 678 (1991); *Questions and Answers Relating to Political Programming Law,* 68 RR 2d 188 (MMB 1990). Thus, no such requirement is applicable to the 1990 primary at issue here.

31. Moreover, as WTVT states, the only requirement is that the non-preemptible class of time be made available to commercial advertisers. By showing that several advertisers purchased non-preemptible time, WTVT has established that such a class of time did exist, and was made available, for commercial advertisers. WTVT concedes that several contracts were revised to include language pertaining to "fixed time," but the station insists that the revisions were intended to correct earlier errors. The erroneous language did not affect the actual treatment of the spots by WTVT.

32. Accordingly, we conclude that Complainants have failed to show that preemptible time sold to commercial advertisers was the functional equivalent of non-preemptible time. Thus, the difference in lower rates charged commercial advertisers for preemptible time are attributable to a difference in class, and do not constitute LUC violations.

33. Complainants argue that price was not the sole basis for WTVT's preemption decisions, but Complainants fail to indicate how WTVT's preemption practices discriminated against political advertisers. Indeed, the amended complaint concedes that political spots were given preferential treatment in preemption decisions.

34. The amended complaint alleges that the rate charged candidates for non-preemptible time was higher than it had to be to guarantee clearance. However, as WTVT points out, candidates were given a choice between buying preemptible and non-preemptible spots. The fact that they chose the latter in order to avoid *any* risk of preemption does not constitute an LUC violation.

35. In any event, Complainants insist that few preemptible spots were preempted, so that there is no justification for the high rates charged candidates for non-preemptible time. WTVT disputes the significance of the data in the amended complaint. The station indicates that the data includes time periods during which there was little, if any, political advertising. With that source of competition for time absent, the preemptible rates were lower. Moreover, WTVT claims that Complainants' data excludes advertising not placed because the advertiser was unwilling to pay the rate needed to clear. The data also excludes spots that ran at a higher rate, paid in order to avoid preemption.

36. We are not persuaded that the higher rates paid by candidates point to discriminatory pricing indicative of an LUC violation. Accordingly, we will take no further action on this aspect of the amended complaint.

Sanctions

37. The *Declaratory Ruling,* at 7514, specifically authorized us to order rebates for LUC violations. We will not order the payment of interest, attorneys' fees, or punitive damages. Although Complainants request such sanctions, they have not cited any precedent in support of our authority to impose those remedies in the specific context of LUC complaints, and we are not aware of any. In any event, this record would not justify those sanctions. Likewise, we do not find that the record supports license revocation or forfeiture. There is no indication that WTVT's violation of the LUC requirements found herein is anything other than isolated and inadvertent. Moreover, there is no evidence of an attempt by WTVT to conceal its conduct. Accordingly, no further action will be taken in connection with this complaint.

CONCLUSION

38. We find that WTVT has violated the Commission's lowest unit charge requirement. In addition to the overcharges admitted by WTVT and already rebated, WTVT overcharged Complainants Lawton Chiles and Bob Martinez for advertising during functionally equivalent dayparts as those sold to commercial advertisers. WTVT is hereby ORDERED to rebate $500.00 to Complainant Chiles and $675.00 to complainant Martinez. The complaint filed by Bill Nelson is denied. No further action is warranted with respect to the above-captioned complaint, and we will consider the matter closed.

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mining an average cost of spots, there is no authority for requiring candidates' spots in the same period to be provided free of charge.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

MITCH MCCONNELL

Against Station WLEX-TV
Lexington, Kentucky

ORDER

Adopted: March 16, 1994; Released: March 18, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed October 30, 1992, on behalf of Senator Mitch McConnell. Senator McConnell alleges that television Station WLEX-TV, Lexington, Kentucky,[1] overcharged him during the 1990 elections in violation of the lowest unit charge ("LUC") requirement of Section 315(b) of the Communications Act of 1934, as amended.[2] Senator McConnell was a legally qualified candidate for nomination and election for United States Senator for the Commonwealth of Kentucky for the May 29, 1990, primary and the November 6, 1990, general election. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that Senator McConnell has established a *prima facie* case of a violation by Station WLEX-TV of the lowest unit charge requirement of Section 315(b)(1) of the Communications Act.

2. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. Senator McConnell alleges that WLEX-TV overcharged him by as much as $24,395 during the 1990 LUC periods. Senator McConnell submits a declaration under penalty of perjury by Cathy Farrell, his media buyer. Ms. Farrell derived the amount of the overcharge by comparing the unit price paid for Senator McConnell's commercial announcements with an estimated lowest unit rate for each such spot. Ms. Farrell obtained her estimate for each spot by multiplying cost per point Spot Quotations and Data, Inc. ("SQAD") and Spot Cost Outlook Projections ("SCOOP") data for the second, third and fourth quarters of 1990, by Station WLEX-TV's ratings for particular dayparts or programs. Ms. Farrell then reduced the figures obtained for each daypart or program by 30% because, in her opinion, buyers will generally aim to purchase individual spots for at least 30% below the SQAD or SCOOP rates. Finally, Ms. Farrell adjusted some of her estimates for lowest unit rate either upward or downward to take into account other relevant information about individual programs, dayparts, or stations in the market. According to Ms. Farrell, Senator McConnell paid more than what she estimated to be the lowest unit rate for each of the time periods in which the spots ran.

3. In *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662-63 (MMB 1992), *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131, 132 (1992) (*"Chiles"*), we determined that a *prima facie* case of a LUC violation could be established by a showing that rates paid by candidates were higher than station specific rates charged commercial advertisers by reference to average market rates and station ratings. *See also, Declaratory Ruling*, 6 FCC Rcd at 7521, n.47. Such is the case here. Comparing the rates paid by Senator McConnell with the SQAD or SCOOP rates,[3] it appears that Station WLEX-TV charged Senator McConnell more than the applicable SQAD or SCOOP rate for 21 of the 35 time periods in which spots ran for Senator McConnell during the 1990 primary and general elections. In this regard, consistent with *Chiles*,[4] we have disregarded the blanket 30% reduction as well as the unspecified adjustments used by Ms. Farrell in her analysis. Accordingly, with respect to the spots that cost more than the SQAD or SCOOP rate, we conclude that further fact finding is warranted to determine whether Senator McConnell was overcharged by Station WLEX-TV in violation of Section 315(b)(1).

4. In the *Declaratory Ruling*, the Commission determined that, once a *prima facie* showing has been made, the complainant will be entitled to limited discovery, subject to specific conditions established by the Bureau. *See* 6 FCC Rcd at 7513-14, 7521, n.49. *See also, Chiles*, 7 FCC Rcd 6665. Accordingly, we will allow Senator McConnell limited discovery on the issue of overcharges during the 45 days before the May 29, 1990, primary and the 60 days before the November 6, 1990, general election regarding spots aired in or adjacent to the programs listed in Appendix D. The documents set forth in Appendix A to this *Order*, and answers to the written interrogatories set forth in Appendix B to this *Order*, must be served upon counsel for Senator McConnell (not the Commission) by Station WLEX-TV on or before the first day of the discovery period, which will be 30 days after the release date of this *Order*. *See* Appendix C.

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[1] Station WLEX-TV did not file an answer to the complaint.

[2] Section 315(b)(1) provides as follows:

> (b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -
>
> (1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period ....

47 U.S.C. Section 315(b)(1). *See also* 47 C.F.R. Section 73.1942(a).

[3] Analysis of Ms. Farrell's estimates of lowest unit charge indicates that she generally relied on the *higher* of the SQAD or SCOOP rates in reaching her conclusions as to whether Senator McConnell was overcharged. We have done likewise.

[4] *See* 7 FCC Rcd at 6663.

5. Any request for further discovery by Senator McConnell must contain a showing that such discovery is necessary to resolve the issue of overcharges. Any discovery request by the station for production of documents, answers to written interrogatories, or for the taking of depositions must demonstrate that the information requested is necessary for the station to respond to arguments or claims that could be made by Senator McConnell in his amended complaint. We emphasize that any request for depositions must also demonstrate that depositions are necessary to resolution of the issue of overcharges and include a list of the proposed deponents.[5] All discovery requests must be filed within the discovery period set forth in Appendix C. The Bureau will rule on all such requests as expeditiously as possible.

6. Documents produced by the station that contain proprietary information may be redacted to delete the identities of commercial advertisers, including the name of the commercial advertiser, its address and telephone number, and the name(s) of any person employed by the advertiser.[6] Where any such information is redacted, the station shall advise Senator McConnell of the type of information deleted. Further redactions will be allowed only if the information redacted is proprietary and not relevant to resolution of the complaint. Should Senator McConnell serve documents upon the station, he may redact proprietary information and so advise the station of the type of information deleted. Any objections to redactions that are not resolved by the parties should be submitted to the Bureau in a written pleading for resolution, along with copies of the documents at issue with the disputed information intact. As with all discovery matters, the parties should make good faith attempts to resolve any discovery disputes before presenting such a dispute to the Bureau.

7. Any documents, answers to written interrogatories, or deposition transcripts, if any, produced during discovery, and the information revealed thereby, shall not be provided to any third party other than the Commission. Copies of all documents, answers to written interrogatories, and deposition transcripts produced shall be stamped with the statement: "This document is subject to a protective order entered by the Federal Communications Commission." It shall be the responsibility of the party producing the documents, answers to written interrogatories, or deposition transcripts to affix the stamp. The parties must take reasonable measures to prevent unauthorized access to the documents, answers to written interrogatories, and deposition transcripts. Access must be limited to Senator McConnell, the management of Station WLEX-TV, their attorneys and staffs, and expert witnesses. Either party may require the other to disclose in writing the names of staff and experts who have access to documents and written information. Each party must explain to all staff and experts that the documents, answers to written interrogatories, deposition transcripts, and their contents may not be disclosed to any entity other than the Commission. None of the materials produced, nor the contents thereof, may be used for any purpose other than the prosecution of the instant complaint. Each individual who is provided access to these materials is hereby required to sign a notarized statement affirmatively stating that the individual has personally reviewed this order and understands the limitations imposed on the signing party. No copies of materials protected by this order may be made except copies to be used by the parities identified in this paragraph. Each party shall maintain a log recording the number of copies made of all proprietary material and the persons to whom the copies have been provided. Upon termination of this proceeding, including any appeals, petitions or settlement, all originals and reproductions of any protected materials, along with the log recording persons who received copies of such materials, shall be provided to the producing party. In addition, upon final termination of the proceeding, any notes or other work product derived in whole or in part from the protected materials of an opposing or third party shall be destroyed. The parties may agree to additional reasonable measures to protect the confidentiality of information as the circumstances may warrant. Such agreeement should be confirmed in writing and a copy provided to the Bureau. As noted in the *Declaratory Ruling*, any failure to abide by the terms of this protective order may result in the imposition of sanctions, including dismissal of the complaint or censure, suspension, or disbarment of the attorneys involved. *See* 47 C.F.R. Section 1.24.

8. Extensions of the discovery period (Appendix C) will be granted only where extraordinary circumstances exist and the parties agree to the extension, or both parties submit declarations that serious settlement discussions are ongoing. Any deadlines within the discovery period may be changed by mutual agreement, with notification to the Bureau, as long as all discovery is completed within the required time. Service of documents, discovery requests, and any pleading which requires a ruling by the Bureau is to occur by the dates set in Appendix C, unless modified by the Bureau or by mutual agreement of the parties.

9. Within 30 days after completion of discovery, Senator McConnell must file an amended complaint, alleging specific facts based on the information discovered, stating the nature of the Section 315(b)(1) violation and the amounts said to be owed. After the station has filed its answer, the parties shall file with the Bureau their election to have the complaint resolved either by the Bureau or by Alternative Dispute Resolution.

10. Settlement of lowest unit charge claims is strongly encouraged. Although the Commission retains its discretion to determine whether additional sanctions are warranted, the Commission is inclined to look with favor upon a settlement in making that determination. *See Declaratory Ruling*, 6 FCC Rcd at 7521, n.52.

11. ACCORDINGLY, we find that a *prima facie* case of the violation of the Commission's lowest unit charge requirement has been established by Senator Mitch McConnell in connection with certain commercials aired on his behalf. The parties are hereby ORDERED to follow

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[5] *See Lawton Chiles, Bob Martinez, and Bill Nelson*, 8 FCC Rcd 714, 717 (MMB 1993). In this regard, we require the party seeking depositions to demonstrate, with respect to each witness it seeks to depose, that the individual's testimony is necessary to the resolution of the issues upon which discovery has been granted herein. This must include "*specific* arguments demonstrating the necessity of the proposed testimony -- both in terms of the information sought and the use of depositions as the means of securing the necessary information -- and should be supported by documentary evidence." *Id.*

[6] Unlike *Chiles*, we find it unnecessary for the station to delete the name of its sales representative at least for national sales inasmuch as the station identified that representative in its correspondence with Senator McConnell.

the procedures and timetable for discovery, post-discovery, and election of a complaint resolution procedure established herein.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

APPENDIX A

DOCUMENTS TO BE PRODUCED TO COMPLAINANT

Certain documents shall be produced to Complainant by WLEX-TV by delivering them to the offices of McGuiness & Holch, 400 N. Capitol St., N.W., Suite 585, Washington, D.C. 20001 in accordance with the procedures outlined in this Order. The documents to be produced are as follows:

1) All advertising contracts executed by or on behalf of candidates for public office in connection with the 1990 primary and general elections.

2) All invoices, logs or other documents recording time, duration, or class of advertising time for each political advertisement ordered and/or aired on behalf of candidates for public office in connection with the 1990 primary and general elections with regard to the programs listed in Appendix D.

3) Copies of invoices and contracts for, and program logs related to, all commercial time run on the station beginning on April 14, 1990 and running through May 28, 1990 (the 45 days preceding the relevant primary election) in connection with the programs listed in Appendix D; and copies of invoices and contracts for, and program logs related to, all commercial time run on the station starting on September 7, 1990 and running through November 5, 1990 (the 60 days preceding the relevant general election) in connection with the programs listed in Appendix D.

This should include:

a) All invoices, logs or other documents recording time, duration, or class of advertising time for each commercial spot aired;

b) All long term contracts that pertain to commercial spots, including make goods and bonus spots, that aired during these periods;

c) All addenda or memoranda relating to these invoices or contracts that alter or otherwise address the terms or provisions of any document subject to production pursuant to this document production order;

d) All orders for commercial spots aired during these periods, including confirmation orders or contracts;

e) All orders for bonus spots, public service announcements, or any other type of free spots, for any of the commercial advertisers who purchased time that ran during these periods; and

f) All documents that describe the rate and other relevant terms (those that affect price or have a direct bearing on the characteristics, such as class of time, of each spot) of discount packages sold to commercial advertisers that included spots that aired during these periods.

4. All documents used by the station to explain to its sales personnel or other employees or agents dealing with political campaigns, or the agents of political campaigns, the application of the lowest unit charge provisions Section 315(b) of the Communications Act. This should include any written policy statement(s) used by the station in 1990 which directly or indirectly related to the station's pricing policies.

5. All documents reflecting the existence, implementation, and results of any audit of rates charged to political advertisers performed by or on behalf of the station with respect to the 1990 primary and general elections, including any provision of rebates to such political advertisers, as well as all documents explaining or detailing the methodology used by the station in performing any such audit or providing any such rebates.

APPENDIX B

ADDITIONAL INFORMATION TO BE PROVIDED TO COMPLAINANTS

Answers to the following interrogatories shall be provided to Complainant in accordance with the procedures set forth in this modified *Order:*

1) Describe how WLEX-TV arrived at its lowest unit charge ("LUC") in 1990.

2) Detail any actions taken by WLEX-TV to ensure that political advertisers were, in fact, charged the lowest unit rate for the same class and amount of time during the same time periods which ran during the 1990 statutory LUC periods. This should include the identities of all individuals taking or participating in such action, identifying their position at the station, and should identify all documents which refer to or formed a part of the station's efforts to ensure that candidates received the LUC.

3) Provide a statement that, in connection with the programs listed in Appendix D, indicates the class and length of each commercial spot, if not apparent from the program logs, invoices or contracts, that aired during the relevant time periods.

4) Provide a statement that explains any codes used by the station or its sales representatives to indicate the rate, section or class of spot identified in confirmation contracts, program logs, affidavits of actual broadcast or other documents relating to advertising rates.

APPENDIX C

TIMETABLE FOR DISCOVERY AND POST-DISCOVERY

First day of discovery period:	Day 1
Documents in Appendix A and Answers to Written Interrogatories in Appendix B due:	Day 1
Request by Complainant for further discovery (production of additional documents, answers to additional written interrogatories, and/or for the taking of depositions) due:	Day 15
Opposition by station to Complainant's request for further discovery due:	Day 20
Station's request for discovery (production of documents, answers to written interrogatories, and/or for the taking of depositions) due:	Day 20
Opposition by Complainant to station's request for discovery due:	Day 27
Documents and answers to written interrogatories (if allowed by Bureau) pursuant to station's request for discovery due:	Day 45
Production of additional documents and/or answers to additional written interrogatories (if allowed by Bureau) pursuant to Complainant's request for further discovery due:	Day 60
Final day of discovery period:	Day 60
Complainant's amended complaint due:	Day 90
Station's answer to amended complaint due:	Day 105
Joint notice of election of complaint resolution procedure due:	Day 116

APPENDIX D

LIST OF PERTINENT PROGRAMS

I. APRIL 14 - MAY 28, 1990

Program	Time
Ky Sunrise	630-700 AM
Early News	530-630 PM
Matlock	Tu 8-900 PM
Unslvd Mys	W 8-900 PM
Nt Crt/John	W 9-1000 PM
LA Law	Th 10-1100 PM
Late News	11-1130 PM
Tonight	1130-1230 AM

II. SEPTEMBER 7 - NOVEMBER 5, 1990

Early News	530-630 PM
Matlock	Tu 8-900 PM
Unslvd Mys	W 8-900 PM
Cosby	Th 8-900 PM
Fanelli	W 9-1000 PM
Cheers	Th 9-1000 PM
Nt Crt/Wings	F 9-1000 PM
Gold/West	Sa 9-1000 PM
Sun Movie	Su 9-1100 PM
Midnight	F 10-1100 PM
LA Law	Th 11-1130 PM
Late News	Sa 11-1130 PM
Tonight	1130-1230 AM

Before the
Federal Communications Commission
Washington, D.C. 20554

In re Complaint of

McCONNELL SENATE COMMITTEE

Against Station WCPO-TV
Cincinnati, Ohio

ORDER

Adopted: March 16, 1994; Released: March 18, 1994

By the Chief, Mass Media Bureau:

1. The Mass Media Bureau has before it a complaint filed September 29, 1992, on behalf of the McConnell Senate Committee ("Committee") and an answer filed on October 15, 1992, on behalf of Station WCPO-TV, Cincinnati, Ohio ("WCPO"). The Committee contends that WCPO overcharged it during the 1990 primary and general elections for United States Senator from Kentucky in violation of the lowest unit charge ("LUC") requirement of Section 315(b) of the Communications Act of 1934, as amended.[1] Senator McConnell was a legally qualified candidate for nomination and election in the May 29, 1990, primary and the November 6, 1990, general elections. Applying the guidelines set forth in *Lowest Unit Charge Requirements*, 6 FCC Rcd 7511 (1991), *recon. denied*, 7 FCC Rcd 4123 (1992) (*"Declaratory Ruling"*), to the information presented, we find that the Committee has failed to establish a *prima facie* case of a violation by WCPO of the lowest unit charge requirement of Section 315(b)(1) of the Communications Act.

2. To demonstrate that it was overcharged by WCPO, the Committee calculates WCPO's LUC by multiplying SCOOP[2] and SQAD[3] cost per point data by WCPO's ratings for various programs. The resultant cost per spot is then reduced by 30 percent and compared to the cost per spot paid by the Committee. Based on this methodology, the Committee estimates that it was overcharged a minimum of $53,325.

3. In its answer, WCPO points out that the complaint does not indicate which SQAD and SCOOP reports were utilized by the Committee in the aforementioned calculations. WCPO states that, although the Committee has provided it with additional information concerning the sources used in making its LUC estimates, the additional information is inadequate to permit WCPO "to trace the specific information upon which complainant relied in compiling its 'data reports.'" WCPO also contends that the complaint is defective in that it fails to identify the source of the ratings used in calculating WCPO's LUC. Finally, WCPO notes, the complaint fails to identify the dates of the various purchases for which the Committee claims it was overcharged.

4. To establish a *prima facie* case, a complainant must, at a minimum, submit "a short, plain statement of the claim sufficient to show that the complainant is entitled to the relief requested." *Declaratory Ruling*, 6 FCC Rcd at 7513. Moreover, where a complainant is relying on SQAD and SCOOP data to support its complaint, complainants are required to provide the Commission with information indicating which monthly reports formed the basis for its allegations and the manner in which the data is utilized. *Lawton Chiles, Bob Martinez, Bill Nelson, and Jim Smith*, 7 FCC Rcd 6661, 6662 (MMB 1992) *modified*, 7 FCC Rcd 7199 (MMB 1992), *review granted in part and denied in part*, 8 FCC Rcd 131 (1992). As WCPO points out in its answer, the Committee has identified neither the source of the household rating data nor the relevant time periods of the SQAD and SCOOP data upon which it relies. Moreover, the Committee has not identified the specific dates or times of the spots for which it claims to have been overcharged. In this circumstance, the Commission, and WCPO, cannot assess the accuracy of the Committee's claims.[4] In the absence of a verifiable claim, the Commission cannot conclude that the Committee has made a *prima facie* case.

5. ACCORDINGLY, we find that the McConnell Senate Committee has failed to establish a *prima facie* case and its complaint is DISMISSED.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart
Chief, Mass Media Bureau

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[1] Section 315(b)(1) provides as follows:

(b) The charges made for the use of any broadcasting station by any person who is a legally qualified candidate for any public office in connection with his campaign for nomination for election, or election, to such office shall not exceed -

(1) during the forty-five days preceding the date of a primary or primary runoff election and during the sixty days preceding the date of a general or special election in which such person is a candidate, the lowest unit charge of the station for the same class and amount of time for the same period ....

47 U.S.C. Section 315(b)(1). *See also* 47 C.F.R. Section 73.1942(a).

[2] "SCOOP" is the acronym for Spot Cost Outlook and Projections. SCOOP is a product of "Media Market Guide." SCOOP provides cost-per-point information for eight dayparts and various demographics.

[3] "SQAD" is the acronym for Spot Quotations and Data, Inc., a computerized data publishing service. Through this service, advertising subscribers receive monthly reports that provide cost-per-point information for 30-second spots in specific dayparts for the markets selected by the subscriber.

[4] We note that additional information was apparently provided to WCPO by the Committee. This information, however, has never been provided to the Commission.

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 93-162

In the Matter of

Local Exchange Carriers' Rates,
Terms, and Conditions for
Expanded Interconnection for
Special Access

Pacific Bell Transmittal No. 1686
Revisions to Tariff
F.C.C. No. 128

MEMORANDUM OPINION AND ORDER

Adopted: March 17, 1994; Released: March 18, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On February 4, 1994, Pacific Bell filed Transmittal No. 1686 to revise its Tariff F.C.C. No. 128. Pacific Bell proposes adding one additional telephone company central office to the list of central offices where it will offer expanded interconnection service. Pacific Bell states that the purpose of this filing is to respond to a *bona fide* request from a customer for expanded interconnection service in the SNFCCA12/19 wire center, located in two adjoining central office buildings in San Francisco, California. Description and Justification at Page 1-1. No petitions were filed against this tariff. Transmittal 1686 is scheduled to take effect on March 21, 1994.

2. This transmittal raises the same issues regarding cost allocations, rate levels, rate structures, and terms and conditions of service as those identified in the *Expanded Interconnection Tariff Order*.[1] Therefore, Transmittal No. 1686 is suspended for one day, until March 22, 1994, and will be subject to the investigation initiated in the *Expanded Interconnection Tariff Order*. These rates will also be subject to an accounting order to facilitate any refunds that may later prove necessary.

3. Accordingly, IT IS ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), and Section 0.291 of the Commission's Rules, 47 C.F.R. § 0.291, the revisions to Pacific Bell Tariff F.C.C. No. 128, Transmittal No. 1686, ARE SUSPENDED for one day and an investigation of the referenced tariff transmittal IS INSTITUTED.

4. IT IS FURTHER ORDERED that Pacific Bell SHALL FILE tariff revisions within five business days of the effective date of this Order to reflect this suspension.

5. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.56, 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.56, 61.58, and 61.59. Pacific Bell should cite the "DA" number of the instant Order as the authority for this filing.

6. IT IS FURTHER ORDERED that, pursuant to Section 204(a) of the Communications Act of 1934, 47 U.S.C. § 204(a), Pacific Bell shall keep accurate account of all amounts received by reason of the rates that are the subject of this investigation.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] Ameritech Operating Companies, *et. al*, CC Docket No. 93-162, 8 FCC Rcd 4589 (Com. Car. Bur. 1993) (*Expanded Interconnection Tariff Order*).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Commission Requirements
for Cost Support Material
To Be Filed with 1994 Annual
Access Tariffs and for Other
Cost Support Material

Petitions for Waivers

ORDER

Adopted: March 18, 1994; Released: March 18, 1994

By the Chief, Common Carrier Bureau:

I. INTRODUCTION

1. On February 18, 1994, this Bureau released an Order in the above captioned proceeding that established Tariff Review Plans (TRPs) that local exchange carriers (LECs) must file to support their annual access charge tariff filings scheduled for April 1, 1994.[1] The *1994 TRP Order* provided TRP formats, described changes from previous TRPs, and set a schedule for the proceeding. The filing date for petitions for waiver of the TRP Order was set for February 28, 1994. The filing date for replies to waiver requests was set for March 4, 1994.

2. Petitions for waiver were filed by Alltel Service Corporation (Alltel), Citizens Utilities Company (Citizens), GVNW, Incorporated (GVNW), Minnesota Independent Equal Access Corporation (Minnesota), NYNEX Telephone Companies (NYNEX), South Dakota Network, Incorporated (South Dakota), and U S West Communications (U S West). Replies to petitions were filed by American Telephone and Telegraph Company (AT&T), EMI Communications Corporation (EMI), MCI Communications Company (MCI), Rochester Long Distance, Inc. (RCI), Sprint Communications Company (Sprint), and Time Warner Communications (Time Warner). In this Order, the Bureau grants some of these requests but denies others.

II. DISCUSSION

A. Alltel

3. In November 1993, Alltel created two companies in Georgia as a result of property exchanges between Alltel and GTE Corporation.[2] With regard to these properties, Alltel seeks a waiver of the requirement for baseline rate of return companies to submit in support of its proposed rates a past year cost of service (PYCOS) study for the period from January 1993 through December 1993.[3] Instead, Alltel proposes to annualize data for the two months during which Alltel operated the new companies in Georgia. Alltel's request pertains to Chart RORCOS-1 which contains a summary of historical costs. According to Alltel, this waiver would serve the public interest by providing the most accurate assessment of costs for the companies as operated by Alltel during the PYCOS period. Alltel further maintains that its waiver request is based on a unique set of circumstances and that PYCOS data will be available in the next annual filing.

4. Alltel has not demonstrated good cause for exemption from reporting the PYCOS data on Chart RORCOS-1 and we deny its request for waiver. Two months of annualized historical data, as proposed by Alltel, is insufficient for the FCC and interested parties to use to compare and evaluate with test year costs. Further, Alltel can use historical data for the period that GTE Corporation operated the Georgia properties to create the required PYCOS study. These data, together with the data for Alltel's operating period, should be used to develop PYCOS period data. Therefore, no waiver is justified and we, therefore, deny the request.

5. Alltel states that certain other data are unavailable, and thus, seeks other waivers of TRP reporting requirements.[4] First, Alltel requests a waiver so that it does not need to report demand data for tandem switching and tandem switched transport. These data are to be reported on Chart RORDMD-1, page 3 of 3. Alltel maintains that since no charges were billed for these rate elements in 1993, there are no data to populate row 420, columns E and F. Second, Alltel requests a waiver for certain Alltel companies so that they do not need to report demand data for historical and test year comparisons of local transport demand for entrance facilities and direct trunked transport facilities. These data are to be reported on Chart RORDMD-5, columns A, B, and C. This request is limited to Alltel companies that will become issuing carriers in the Alltel tariff for traffic sensitive rates for the first time. Finally, Alltel requests a waiver to allow companies to report data on Chart RORRTE-1, page 2 of 2, only insofar as the data refer to the local transport structure that will be in use during the 1994-1995 tariff year. Alltel maintains that rows and columns referencing the interim transport structure are not applicable to companies that have not converted to this structure.[5]

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[1] Commission Requirements for Cost Support Material To Be Filed with 1994 Annual Access Tariffs and for Other Cost Support Material, DA 94-165 (Com. Car. Bur., released February 18, 1994) (*1994 TRP Order*).

[2] Pursuant to agreements between Alltel and GTE Corporation, GTE Corporation assigned all of its exchange assets in Georgia to Alltel, and Alltel assigned all of its exchange assets in Illinois, Indiana, and Michigan to GTE Corporation and paid approximately $440 million.

[3] *1994 TRP Order* at 14.

[4] Alltel's Application for Special Permission at 2.

[5] Requirements setting forth which LECs must implement the interim transport rate structure are in *Transport Rate Structure and Pricing*, CC Docket No. 91-213, First Memorandum Opinion and Order on Reconsideration, 8 FCC Rcd 5370, at para. 60 (1993).

6. We grant Alltel's waiver requests concerning Charts RORDMD-1 and RORDMD-5 in part. We deny a waiver to those Alltel companies with rates in effect prior to the 1994 annual filing, since those companies have already made estimates of PYCOS year demand in their local transport restructure filings. These companies must report PYCOS year demand that is based on the allocation methods used in that filing. We grant a waiver to companies that will file rates under the interim transport structure for the first time. However, these companies should explain how they developed test year demand in their description and justification. We also grant a waiver to companies that will not be filing rates under the interim rate structure. A waiver is unnecessary regarding Chart RORRTE-1, because companies are required to report data only for services actually provided.[6] In this case, Alltel companies may report for the portions of Chart RORRTE-1 that are not applicable.

B. Citizens

7. In May 1993, Citizens agreed to acquire local exchange operations from GTE Corporation in several states.[7] Citizens states in its petition that some data on these acquired properties may not be available in time to file with Citizen's annual access tariff filing on April 1, 1994. Citizens anticipates that it will have access to the necessary data by March 31, 1994 and states that the annual filing can be updated once the data are prepared.

8. In opposition, AT&T states that while Citizens' petition may warrant a limited wavier of cost support, its request is unlimited in time and could, therefore, prejudice the rights of access charge customers.[8] AT&T maintains that sufficient time must be afforded customers to prepare pleadings by April 26, 1994, on the rates proposed in Citizens' annual filing. AT&T submits that, if granted, Citizens' waiver to file less than complete cost support should not extend beyond April 15, 1994.

9. We grant Citizens until April 14, 1994, to update charts with the data described in its petition. This delay is unlikely to complicate materially the efforts of interested parties and the Commission to review Citizens' annual filing. Citizens', of course, remains obligated to make its annual filing on April 1, 1994.

C. GVNW

10. GVNW, a management company that files rates on behalf of several LECs, requests a waiver of the annual access filing for this year for three issuing carriers.[9] The waiver would allow the current rates for La Harpe Telephone Company (La Harpe), Alhambra-Grantfork Telephone Company (Alhambra), and Woodhull Telephone Company (Woodhull) to remain in effect. The three companies became issuing carriers and established initial rates in GVNW tariff transmittals filed in early 1994.[10] None of the companies anticipate further change to their cost and demand data for the 1994 annual tariff year that warrant a rate change at this time. Therefore, GVNW argues that the waiver would serve the public interest by reducing the FCC's administrative burden, without diminishing the FCC's ability to regulate rates.

11. The Bureau grants the waivers requested by GVNW on behalf of LA Harpe, Alhambra, and Woodhull.[11] We believe that it would be unnecessarily burdensome to require annual filings this year, given these companies only recently filed initial tariffs.

D. Minnesota and South Dakota

12. Minnesota and South Dakota, centralized equal access providers, each request waivers to not report certain historical and test year data that were used to develop rates for the 1993 annual filings.[12] The primary use of this data, in the context of the 1994 annual filings, is to assess the accuracy of past forecasts. Minnesota and South Dakota maintain that they do not possess the required data, because these companies began operations only in June 1992 and August 1992, respectively. These companies note that waivers concerning the PYCOS study period of 1992 and the test year were granted for the 1993 annual filings, and that the Commission allowed them to use non-standard periods. Therefore, Minnesota and South Dakota maintain that the TRP requirements to provide data used to develop rates last year are not applicable to them. Minnesota and South Dakota emphasize that they will provide calendar year 1993 data, the PYCOS period data which is directly relevant to the development of rates for the 1994 annual filings.

13. In opposition, AT&T maintains that neither Minnesota or South Dakota have sufficiently explained why the data cannot be provided for the part of 1992 in which these companies were operating.[13] AT&T states that Minnesota and South Dakota should file such data along with forecast data reported in their 1993 annual filing.[14]

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[6] Commission Requirements for Cost Support Material to be Filed with Annual Access Tariffs, 6 FCC Rcd 1641, at para 9. (1991).

[7] Citizens' Application for Waiver of TRP Filing Requirements at 1. Under the terms of a purchase agreement with GTE Corporation, Citizens has closed on the purchase of exchange properties in Idaho, Tennessee, Utah, and West Virginia, and expects to acquire exchange properties in Arizona, California, Montana, New York, and Oregon. Citizens states in its waiver request that the TRP will reflect data on the properties closed, and the New York purchase, for which it expects closure in Spring 1994.

[8] AT&T's Opposition to Waiver Requests at 4.

[9] GVNW's Petition for Declaratory Order or, in the Alternative, Waiver (filed Feb. 24, 1994).

[10] GVNW Transmittal No. 92 (filed Oct. 28, 1993), GVNW Transmittal No. 93 (filed Dec. 13, 1993), and GVNW Transmittal No. 94 (filed Dec. 14, 1993), adding La Harpe, Alhambra, and Woodhull as issuing GVNW carriers.

[11] This Bureau granted similar waivers to two GVNW issuing carriers in the *1993 Waiver Order* under comparable circumstances. Commission Requirements for Cost support Material to be Filed with 1993 Annual Access Tariffs, 7 FCC Rcd 2306 (1993) (*1993 Waiver Order*).

[12] Minnesota's Application for Waiver and South Dakota's Application for Waiver.

[13] AT&T's Opposition to Waiver Requests at 5.

[14] In reply, Minnesota and South Dakota state that it would be unduly burdensome for them to derive the data to complete Chart RORCOS-2, page 3. Minnesota's Reply to Opposition to Waiver Request (Mar. 11, 1994) and South Dakota's Reply to Opposition to Waiver Request (Mar. 11, 1994). Minnesota and

14. We grant the waiver requests of Minnesota and SDN. Pursuant to our grant of waivers for the 1993 annual access filings, these companies filed data for a different time period than required by the 1993 TRP Order, for both the PYCOS period and test year. Thus, the requirements to report the PYCOS and test year data from the 1993 annual filings are not applicable to these companies. Further, due to the start-up nature of operations, the specific historical data and forecasts used by these companies to develop rates in 1993 would not be helpful in assessing the accuracy of past forecasts. Therefore, grant of these waivers does not materially affect the ability of the FCC and interested parties to evaluate proposed rates. Minnesota and South Dakota, of course, remain obligated to report the data for the standard PYCOS period associated with the 1994 annual filings.

E. NYNEX

15. Effective July 1, 1994, long term support (LTS) to the National Exchange Carrier Association pool will be recovered from contributing LECs based on their relative share of 1993 access lines. This represents a change from the current LTS allocator which is based on historical costs. The change will increase the level of contributions from some LECs and decrease the level from others. NYNEX claims that the change in allocator will increase the amount of LTS to be recovered through NYNEX's carrier common line (CCL) rates from $2 million to $42 million in the upcoming tariff year.[15] As a result, NYNEX seeks a waiver to recover LTS contributions through a new, separate LTS rate charged to interexchange carriers, instead of recovering LTS through its CCL rates. Without the new charge, NYNEX maintains that increased CCL rates will create uneconomic incentives for interexchange carriers to bypass the NYNEX network.

16. In support, RCI and EMI maintain that the waiver would permit NYNEX to recover LTS obligations in a more rational manner.[16] RCI and EMI further maintain that the NYNEX request represents an appropriate interim solution until the Commission acts to implement NYNEX's Universal Service plan.[17]

17. In opposition, AT&T maintains that NYNEX has failed to demonstrate why NYNEX is uniquely affected by the change in the LTS allocator. Thus, AT&T argues that NYNEX has failed to show why grant of a waiver is warranted.[18] According to MCI, the fact that some LECs will experience an increase in their LTS contributions, while other LECs will experience a decrease, does not by itself justify a different recovery mechanism for NYNEX.[19] AT&T further maintains that the LTS rate would unreasonably discriminate against interexchange carriers by basing the 1994 charge on the number of 1993 access lines presubscribed to that carrier, even though a company's market share may have changed since 1993. MCI further maintains that the *1994 TRP Order* and the Commission's rules allow for waiver of TRP requirements if LECs are unable to provide certain data, and does not allow companies to implement rate structure changes. MCI states that the already immense task of reviewing annual access filings would be unnecessarily complicated if NYNEX's request were granted. Sprint adds that Section 69.3(a) of the rules explicitly prohibits inclusion of carrier-initiated rate structure changes in annual filings.[20] Sprint further contends that NYNEX has separately petitioned for waiver of Part 69 to enable NYNEX to bulk-bill its share of LTS, and that NYNEX's proposed LTS rate should be resolved in the context of that petition, rather than in the annual access proceeding. Time Warner also contends that the issue raised by NYNEX requires FCC review and public notice beyond that permitted in annual proceedings, and that NYNEX should not be permitted to achieve in this annual proceeding what is presently pending review in another proceeding.

18. As noted above, the rate structure change requested by NYNEX for recovery of LTS contributions is the subject of a separate pending proceeding. In this Order, we are primarily concerned with the ability of carriers to meet the specific requirements of the TRPs. The other proceeding is designed to produce a better record in order to rule on the proposal in a broader context. For these reasons, NYNEX has not demonstrated good cause for such action in the context of this Order and we deny its request for waiver.

F. U S West

19. U S West petitions for a waiver of Section 61.45(c) and (d) of the rules to permit a voluntarily reduction to its price cap indexes (PCIs).[21] U S West would file for an exogenous cost adjustment based on the net change to its interstate revenues resulting from its recent sale of eight exchanges in Utah and 60 exchanges in Montana. To derive the exogenous adjustment, U S West would calculate the difference between the annual revenue and hypothetical annual revenue requirement for the sold exchanges.

20. We grant U S West a waiver to account for the effect of exchange sales on PCIs by making an exogenous cost adjustment. We grant this waiver conditioned on the outcome of the fourth year LEC Price Cap Performance Review, which will, among other things, evaluate whether exogenous cost treatment should be afforded transactions where price cap companies sell or swap high cost local exchanges to non-price cap companies.[22] U S West's calculations should reflect as nearly as possible the actual revenue requirement for the specific exchange.[23]

South Dakota further maintain that completing page 3 would be confusing to reviewers, since a waiver was received by the companies with respect to the corresponding portion of the chart in the 1993 annual filings.

[15] NYNEX's Request for Waiver at 1.

[16] Comments of RCI Long Distance, Inc. in support of NYNEX's Waiver Request, and Comments of EMI Communications Corporation in Support of the NYNEX Companies Petition for Waiver (filed Mar. 9, 1994).

[17] NYNEX Transition Plan to Preserve Universal Service in a Competitive Environment, Petition for Waiver (Dec. 18, 1993).

[18] AT&T's Opposition to Waiver Requests at 2.

[19] MCI's Opposition to Waiver at 1.

[20] Sprint's Opposition to NYNEX request for Waiver. Sprint also cites to 2 FCC Rcd 6447 (1987) (*Part 69 Conformance Order*).

[21] U S West Petition for Waiver at 1.

[22] *Price Cap Performance Review for Local Exchange Carriers*, CC Docket No. 94-1, Notice of Proposed Rulemaking, FCC 94-10 (released Feb. 16, 1994).

[23] We will defer until review of the annual access tariffs an assessment of whether the method that U S West proposes to

III. ORDERING CLAUSE

21. Accordingly, IT IS ORDERED that the waiver petition filed by Alltel Service Corporation is hereby GRANTED IN PART as specified herein and OTHERWISE IS DENIED.

22. IT IS FURTHER ORDERED that the waiver petition filed by Citizens Utilities Company is hereby GRANTED as specified herein.

23. IT IS FURTHER ORDERED that the waiver petition filed by GVNW, Incorporated is hereby GRANTED.

24. IT IS FURTHER ORDERED that the waiver petition filed by Minnesota Independent Equal Access Corporation is hereby GRANTED.

25. IT IS FURTHER ORDERED that the waiver petition filed by South Dakota Network, Incorporated is hereby GRANTED.

26. IT IS FURTHER ORDERED that the waiver petition filed by NYNEX Telephone Companies is hereby DENIED.

27. IT IS FURTHER ORDERED that the waiver petition filed by U S West is hereby GRANTED.

FEDERAL COMMUNICATIONS COMMISSION

Kathleen B. Levitz
Deputy Chief,
Common Carrier Bureau

use to calculate the revenue requirement associated with the sold exchanges is reasonable. U S West's method raises several questions; for example, whether certain state expenses should be allocated to the exchanges according to the relative amount of exchange plant investment, rather than state access lines as U S West intends to do.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

NYNEX Telephone Companies
Tariff F.C.C. No. 1

Transmittal No. 127

Applications for Review

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1994; **Released: March 22, 1994**

By the Commission:

I. INTRODUCTION AND BACKGROUND

1. In this Order we respond to the remand[1] by the United States Court of Appeals for the District of Columbia Circuit of our *Review Order*[2] in the above-captioned proceeding. Accordingly, we provide additional explanation of our transition provisions and modify the grandfathering provisions of the *Review Order*. In addition we deny NYNEX's request for waiver of our network disclosure requirements. Finally, we direct the General Counsel to seek removal of the stay[3] imposed by the Court.

2. The CPE industry has exhibited growth and innovation in the fourteen years since the Commission deregulated CPE and required what was then the Bell System, as well as all other carriers, to detariff CPE and to unbundle it from their network service offerings.[4] Today, the domestic data communications customer-premises equipment (CPE) industry is a competitive marketplace, permitting users to select from a large variety of products offered at a wide range of prices. This decision to detariff and unbundle CPE was a continuation of policies that required carriers to permit end-users to provide their own CPE, and to permit this CPE to be connected in a nondiscriminatory manner to carriers' network services.

3. The underlying rationale for the Commission's procompetitive CPE policies and rules remains as valid today as it was during the *Computer II Decisions*. The classification of user-providable equipment as unregulated CPE has benefitted data communications network users in numerous ways.[5] The resulting increased competition among manufacturers has driven improvements in equipment quality, lowered CPE prices, and improved the performance of users' data communications networks.[6] These policies have also created new job opportunities in several related sectors of the economy.

4. On February 11, 1993, the Common Carrier Bureau (Bureau) released an order[7] denying a petition to reject NYNEX Transmittal No. 127, which established NYNEX's Enterprise service (Enterprise). The Bureau's order also granted a limited waiver of Section 64.702(e) of the Commission's Rules, 47 C.F.R. § 64.702(e), the customer premises equipment (CPE) unbundling rule,[8] to enable NYNEX Telephone Companies (NYNEX) to offer Enterprise service using multiplexers on a customer's premises. The order limited the waiver to situations where a customer subscribed to 22 or fewer Enterprise DS0[9] channels at one location.[10]

5. NYNEX filed Transmittal 127 on October 22, 1992, to introduce Enterprise DS0 service. Enterprise combines transmission service, provided largely over fiber-optic facilities, with certain automated network management features, such as remote monitoring and provisioning.[11] The service is delivered by placing on the customer's premises "intelligent" multiplexing equipment (Newbridge Mainstreet 3600 or 3624), which communicates with Newbridge multiplexers at NYNEX's central office. The 24th DS0 channel on the customer premises multiplexer is used to communicate with the central office multiplexer and thereby provide the network management features of Enterprise. The Newbridge multiplexer on the customer's premises is also used to convert DS1 channels into multiple DS0 channels. NYNEX argued that the Enterprise DS0 service could be offered only if NYNEX deployed multiplexers on cus-

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[1] *New England Telephone and Telegraph Co. and New York Telephone Co. v. FCC*, No. 93-1734, slip. op. (D.C. Cir. Jan.26, 1994).

[2] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, 7 FCC Rcd 7684 (1993) (*Review Order*).

[3] *New England Telephone and Telegraph Co. and New York Telephone Co. v. FCC*, No. 93-1734, slip. op. (D.C. Cir. Nov. 8, 1993).

[4] *See* Amendment of Section 64.702 of the Commission's Rules and Regulations, 77 FCC2d 384, 438-47 (1980), *on recon.*, 84 FCC2d 50 (1980)(*Computer II Decisions*).

[5] For example, it has significantly increased user flexibility in creating and managing networks. Users are now free to integrate the functionality performed by multiplexers and channel termination equipment with other CPE, thereby reducing their costs. In addition, user provision of CPE has encouraged many additional equipment manufacturers to enter the marketplace.

[6] *See* Hunter, *T-1 Muxes Reflect User Sophistication*, Network World, January 11, 1988, at 1, 39 (Stating that users are purchasing equipment for their network communications that provide better bandwidth utilization, "smart" switching and alternate routing capabilities and network control and diagnostic functionalities).

[7] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, Order, 8 FCC Rcd 693 (Com. Car. Bur. 1993) (*Waiver Order*).

[8] Section 64.702(e), known both as the "bundling" and the "anti-bundling" rule, prohibits bundling of CPE with regulated (tariffed) transmission service. CPE is equipment located at a subscriber's premises that is connected to a carrier's communication channel(s) at the network interface at that subscriber's premises. Amendment of Section 64.702 of the Commission's Rules and Regulations (Second Computer Inquiry), Final Decision, 77 F.C.C. 2d 384, 398 n.10 (1980).

[9] DS0 service is a communications channel with a data stream transmission capacity of 64 Kbps, commonly used as an individual circuit for either voice grade analog or digital data transmission. DS1 service is equivalent to 24 DS0 circuits, or 1.544 Mbps. DS3 service is equivalent to 28 DS1 circuits, or 44.736 Mbps.

[10] *Waiver Order*, 8 FCC Rcd at 695.

[11] Transmittal 127, Description and Justification.

tomers' premises and contended that such equipment fell within the "multiplexer exception" to the Commission's prohibition against bundling CPE with tariffed offerings.[12]

6. In the *Waiver Order*, the Bureau held that NYNEX failed to demonstrate that the Newbridge multiplexers used to deliver Enterprise fell within the multiplexer exception to the Commission's rule against bundling CPE, and therefore concluded that Transmittal 127 violated Section 64.702(e).[13] For other reasons, however, the Bureau also found that the record before it warranted granting NYNEX a limited waiver of Section 64.702(e).[14]

7. On October 13, 1993, this Commission adopted a *Memorandum Opinion and Order* overturning the Bureau's waiver order.[15] The Commission, after a review of the record developed on review of the Bureau's order, found that NYNEX had failed to demonstrate that multiplexers on a customer's premises are required to make Enterprise service technically possible, and failed to show that comparable efficiencies or services could not be attained through the use of unregulated CPE. We agreed with the Bureau's conclusion that NYNEX's use of bundled multiplexers for Enterprise service does not fall within the multiplexer exception. Accordingly, we ordered NYNEX either to withdraw Enterprise service, or to revise its offering to provide service on an unbundled basis and to comply with the network disclosure requirements of section 68.110 and 64.702(d)(2) of the Commission's rules,[16] by publishing interface standards for multiplexer interconnection and interoperation with Enterprise service. This would enable customers to use their own multiplexers as CPE. To protect existing Enterprise customers against unreasonable disruptions to their services, we permitted the waiver to remain in effect for existing interstate customers of Enterprise service for a twelve-month transition period, beginning on the day following the release of the *Review Order*.[17] Customers taking only the intrastate equivalent of Enterprise service were not permitted to add interstate circuits. During the twelve-month interim period, new circuits could be added under Transmittal 127 only if they were directly interconnected with customers covered by the waiver.[18] Our network disclosure rules prohibit NYNEX from offering the service using unregulated CPE until at least six months after making the network disclosure.[19]

8. On November 1, 1993, NYNEX filed an "Emergency Application for Stay" of the *Review Order*.[20] On November 8, 1993, the court granted NYNEX's request for stay, pending court review of the *Review Order*.[21] The court stated that its order was without prejudice to the Commission seeking a remand of the record to explain its determination to limit the availability of Enterprise service to existing customers, while NYNEX complies with the network disclosure requirements.[22] On November 17, 1993, the Commission sought remand of the record from the court. The court remanded the matter to the Commission on January 26, 1994.[23]

9. In this order, we explain the transition mechanism we established to apply while NYNEX came into full compliance with our unbundling rule. Based upon the record adduced from the stay petitions, we also modify our interim provisions to allow customers taking only intrastate Enterprise service, as herein defined, to add interstate circuits, and we permit NYNEX to fill service orders pending as of the date of this order. We conclude that NYNEX's request for waiver of the network disclosure rules should be denied and require that NYNEX limit its marketing of Enterprise service to offerings that are in compliance with paragraph 24 of this decision.[24] Finally, we conclude that we need not address NYNEX's application for stay since the court granted NYNEX a stay on the same subject matter.

II. DISCUSSION

A. Interim Provisions During Period of Network Disclosure

10. The *Review Order* decision to limit the availability of Enterprise service, during the period of network disclosure, to existing interstate customers reflected a balancing of factors based on the extant record. First, we considered that the placement of multiplexers on a customer's premises violates Section 64.702(e) of the Commission's rules.[25] The *Review Order* determined that the waiver granted on a *sua sponte* basis by the Bureau was unlawful.[26] Therefore, prompt enforcement of the Commission's unbundling rule was appropriate. Second, permitting additional installations of bundled equipment under the unlawful Enterprise tariff

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[12] *Id.* at 21-27.

[13] *Waiver Order*, 8 FCC Rcd at 695.

[14] *Id.*

[15] NYNEX Telephone Companies, Tariff F.C.C. No. 1, Transmittal No. 127, 7 FCC Rcd 7684 (1993).

[16] 47 C.F.R. §§ 68.110, 64.702(d)(2).

[17] *Review Order* at para. 36.

[18] *Id.* at n.77.

[19] Furnishing of Customer Premises Equipment by the Bell Operating Companies and the Independent Telephone Companies, *Report and Order*, 2 FCC Rcd 143, 151 n.132. (1987).

[20] The Independent Data Communications Manufacturers Association, Inc. (IDCMA) responded with its "Opposition to Emergency Application for Stay" on November 2, 1993. Also on November 2, NYNEX filed a "Supplemental Application for Stay" and a "Petition for Waiver." On November 4, IDCMA filed its "Consolidated Response to NYNEX's Supplemental Application for Stay and Petition for Waiver." Also on November 4, NYNEX filed an "Emergency Motion for Stay Pending Review" with the United States Court of Appeals for the D.C. Circuit. On November 5, the Commission filed an opposition to that motion, and IDCMA filed a response. NYNEX filed its reply with the court on November 8.

[21] *New England Telephone and Telegraph Co. and New York Telephone Co. v. FCC*, No. 93-1734, slip op. (D.C. Cir. Nov. 8, 1993)(per curiam).

[22] *Id.*

[23] *New England Telephone and Telegraph Co. and New York Telephone Co. v. FCC*, No. 93-1734, slip op. (D.C. Cir. Jan.26, 1994).

[24] NYNEX made its network disclosure by referencing the Newbridge Interface specifications in its Transmittal No. 234, filed October 18, 1993, and by advertisement in the *New York Times* on October 19, 1993. In its opposition to NYNEX's transmittal, IDCMA has contested the adequacy of the disclosure. We do not decide that issue in this order.

[25] Our *Review Order* upheld the Bureau's finding in the *Waiver Order* that the multiplexer exception does not apply to the Newbridge multiplexer used to deliver DS0 channels in Enterprise service. *Waiver Order*, 8 FCC Rcd at 695.

[26] *Waiver Order* at ¶ 31 ff.

would directly harm competitive equipment providers, and indirectly equipment consumers, contrary to the underlying purpose of the CPE unbundling rule. The CPE unbundling rule protects CPE competition by prohibiting LECs from offering competitively available CPE as part of tariffed service offerings. Consumers benefit from the spurred technological innovation and price competition of the unregulated CPE marketplace. Therefore, enforcing prompt compliance with the unbundling rules was necessary to further the Commission's important and longstanding policy objectives.

11. Notwithstanding these policy concerns, the legitimate expectations and needs of Enterprise customers who received Enterprise service pursuant to the Bureau's *Waiver Order*, also had to be considered. We determined that existing customers would suffer disruption in their businesses if this service were to be withdrawn precipitously. The first major group of customers for Enterprise service was the Securities Industry Association (SIA). To a large extent, Enterprise service was designed in response to a request for proposal (RFP) sponsored by SIA. Many SIA members had already subscribed to Enterprise service. Therefore, in our *Review Order*, we permitted NYNEX to continue its offering for twelve months, to customers receiving interstate Enterprise service under the waiver as of the release date of the *Review Order*.

12. We also considered factors that mitigate potential harm to NYNEX, its customers and to competitive CPE providers. The unlawful configuration of Enterprise service places the multiplexing equipment on the customer's premises; *e.g.*, in the customer's data room. However, there are other configurations of the service which do not place the multiplexing equipment on the customer's premises. For example, multiplexing equipment "may be placed in a secured location in common space in the basement of a high-rise building" to provide the service to customers located throughout the building.[27] We also considered whether the needs of NYNEX customers not already receiving Enterprise service were met some other way.[28]

13. Therefore, in fashioning interim provisions during the period of network disclosure, we attempted to balance the interests of NYNEX, competitive CPE providers, and their customers, and current Enterprise customers receiving service pursuant to the Bureau's waiver order. At the same time, we considered the need to enforce the Commission policies represented by the unbundling and network disclosure rules. Accordingly, we determined that the best balancing of these interests was to give NYNEX the choice of withdrawing its tariff or replacing the service with an unbundled version after complying with the network disclosure requirements. To prevent disruption to existing customers, we allowed the waiver to remain in effect for the bundled arrangements of interstate customers taking Enterprise service prior to the release of the *Review Order*, during a twelve-month period in which NYNEX could decide whether to unbundle or to terminate the service.[29]

B. Disposition of Service Orders Pending as of Release Date of the *Review Order*

14. In developing the *Review Order* and its interim provisions, the Commission had no indication that many customers would experience any problem if pending orders for Enterprise service could not be immediately filled. However, the affidavit of Joseph Lucatorto, filed with the court, states that almost 13,000 orders for additional circuits remained unfilled as of November 3, 1993.[30]

15. As of January 26, 1994, NYNEX reports that orders for 14,000 additional circuits are unfilled. According to NYNEX, 54 percent of these ordered circuits would require a multiplexer on the customer's premises. In addition, NYNEX advises us that 62 percent of the circuits ordered are for interstate service while the remaining 38 percent are ordered under the New York tariff. NYNEX states that these circuit orders are pursuant to approximately 220 contracts which NYNEX has in hand.

16. New customers, who have not used the flexible provisioning features of Enterprise service to establish and connect communications lines to replace outmoded securities trading methods (previously conducted in open trading pits), have a legitimate expectation that they soon will receive Enterprise service. They have undoubtedly made business plans based on these expectations. This is particularly true of SIA members. Therefore, we conclude that inclusion within the waiver of those service orders pending as of the release date of this order is consistent with our goal of avoiding unreasonable customer disruption. New customers whose orders were not filled as of the release of our *Review Order* placed their orders in good faith and in reliance on NYNEX's effective tariff. These customers had a reasonable expectation that their business needs would be met by becoming Enterprise customers. We are modifying the interim provisions of the *Review Order* to provide equitable treatment for these new customers. Given the limited number of orders on file, CPE competition should not be materially affected. We also find it reasonable to extend the waiver provisions to customers that placed orders after the stay and before the release of this order. Given that the court's stay of our Order had the effect of reinstating the Bureau's *Waiver Order* in its entirety, these customers also placed orders with good faith reliance on NYNEX's tariff and a reasonable expectation that their orders would be met. The addition of these customers is limited and should not materially affect CPE competition. Accordingly, we will allow new customers, for whom orders in the form of access service requests (ASRs) are on file with NYNEX as of the release date of this order, to be included as grandfathered customers pursuant to the interim provisions of the *Review Order*.

C. Effect of Interim Provisions on Intrastate Customers

17. While the *Review Order* permitted the waiver to remain in effect for the bundled arrangements of interstate Enterprise service customers as of the release of that order, it excluded customers receiving only intrastate Enterprise service. We assumed that adding interstate circuits constituted a major service expansion. In fact, the majority of

[27] NYNEX Transmittal No. 127, Description and Justification (D&J) at 9 n.4.

[28] For example, NYNEX offers twelve types of channels, in addition to Enterprise service channels, for the provision of special access arrangements.

[29] *Review Order* at ¶ 36.

[30] Emergency Motion for Stay Pending Review, Affidavit of Joseph Lucatorto at 3-4.

customers have mixed interstate and intrastate usage. We anticipate that virtually all purely intrastate Enterprise customers seeking to add interstate circuits in the near future will do so in response to situations such as interstate relocations of points already accessed on the customer's intrastate network. Therefore, we now conclude that it is unnecessary to exclude the purely intrastate customers of NYNEX's Enterprise service[31] from adding interstate circuits. We also recognize that the addition of interstate circuits to existing Enterprise service does not necessarily require the addition of another multiplexer. Thus, in balancing the potential harm to those customers and the public interest in a pro-competitive CPE marketplace, we find it reasonable to remove the restriction and also permit intrastate customers, as of the release date of this order, to order interstate circuits subject to the conditions of the waiver during the interim period established in the *Review Order*.

III. Effect of Interim Provisions on NYNEX's Marketing Efforts for Enterprise Service and NYNEX's Petition for Waiver of the Network Disclosure Provisions

18. Under our network disclosure rules, the appropriate time to make network disclosure is at the "make/buy" point, *i.e.*, when the local exchange carrier decides to manufacture itself or to procure from an unaffiliated company any product the design of which either affects the network interface or relies on the network interface.[32] These network disclosure requirements represent a balance between two countervailing concerns. On the one hand, the BOCs may have some ability to design new network services or change network technical specifications to favor their own CPE or that of a preferred manufacturer, with attendant anticompetitive effects. On the other hand, premature disclosure of this information could inhibit the BOCs' incentive to provide innovative services. In the instant case, the Commission's has determined that network disclosure is required because NYNEX is procuring from Newbridge, an unaffiliated company, multiplexers that use a new network interface.

A. Pleadings

19. On November 2, 1993, NYNEX petitioned for waiver of the network disclosure requirements of Sections 68.110 and 64.702(d)(2) of the Commission's rules.[33] Specifically, NYNEX seeks waiver of the six-month requirement and asks that it be permitted to offer Enterprise service as soon as tariffs that are in compliance with the *Review Order* become effective.[34] NYNEX argues that customers and NYNEX will be irreparably harmed if it cannot offer Enterprise service to new customers before the six-month period lapses.[35]

20. IDCMA argues that NYNEX has failed to justify its waiver request and that NYNEX's petition should be summarily denied.[36] IDCMA argues that granting NYNEX a waiver of the six-month network disclosure period would perpetuate the harm to competing CPE providers because those providers would not have sufficient time to develop competing equipment while NYNEX continues marketing its unlawful service.[37] IDCMA further contends that if NYNEX's petition were granted and the Newbridge equipment would no longer be regulated, the potential for price discrimination would be increased, facilitating NYNEX's ability to lower multiplexer prices for customers shifting more of their traffic to Enterprise service. IDCMA asserts that CPE unbundling should foster a competitive market, not create an unregulated, monopoly environment where alternative providers have not even had an opportunity to design substitutes.[38] Concerning NYNEX's argument that it seeks to protect the interests of prospective customers, IDCMA argues that NYNEX should adopt standard network protocols, such as the Simple Network Management Protocol, which would permit connection of competitively available CPE to derive Enterprise DS0 channels.[39]

21. In reply NYNEX asserts that its requested waiver would serve the public interest by making available "a superior communications service that many businesses have eagerly sought to purchase," and that failure to grant the waiver will significantly delay access to the service by those consumers.[40] NYNEX also argues that a grant of its waiver request will not foreclose CPE competition. To assure that it does not "lock in" customers, NYNEX suggests several actions to be included as conditions to its waiver request. First, NYNEX would inform all affected customers that they will be moved to a new, unbundled service offering requiring them to provide their own CPE by leasing or purchasing a multiplexer from either NYNEX or another vendor. Second, NYNEX would make testing facilities and personnel available to multiplexer vendors to test compatibility of their equipment. Third, throughout 1994, NYNEX will maintain and update a list of compatible equipment. Finally, NYNEX offers to waive termination or rollover charges associated with the removal of NYNEX-leased multiplexers and the connection of customer provided CPE to Enterprise service if the removal is requested prior to December 31, 1994.[41]

B. Discussion

22. A petition for waiver of the Commission's rules may

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[31] Enterprise service is provided on an intrastate basis under the New York Public Service Commission Tariff No. 900.

[32] *See* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 150-51, *on recon.*, 3 FCC Rcd 22, 23-24 (1987). *See also* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, 95 FCC 2d 1117, 1135, (1984), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984), *aff'd sub nom. North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th cir. 1985); Computer and Business Equipment Manufacturers Association, *Report and Order*, 93 FCC 2d 1226, 1227, (1983).

[33] 47 C.F.R. §§ 68.110, 64.702(d)(2).

[34] NYNEX Waiver Request at 4.

[35] *Id.*

[36] IDCMA Opposition at 1-2.

[37] *Id.* at 3.

[38] *Id.* at 4.

[39] *Id.* at 5.

[40] NYNEX Reply at 3.

[41] *Id.* at 4.

be granted for good cause shown.[42] The Commission may exercise its discretion to waive a rule where particular facts would make strict compliance inconsistent with the public interest.[43] The Court of Appeals for the District of Columbia Circuit has stated that waivers permit a more rigorous adherence to an effective regulation by allowing the agency to take into account considerations of hardship, equity, or more effective implementation of overall policy on an individualized basis, while also emphasizing that, "[a]n applicant for waiver faces a high hurdle even at the starting gate."[44] In *WAIT Radio*, the court explained that "[t]he very essence of a waiver is the assumed validity of the general rule . . . ."[45] Given the validity of the rule, the test identified in *WAIT Radio*, requires the party seeking the waiver to demonstrate that the rule is unjust as applied to the party given the unique circumstances of the situation.[46] Waiver is thus appropriate only if special circumstances warrant a deviation from the general rule and such deviation will better serve the public interest than adherence to the general rule.[47] Therefore, the test for whether NYNEX may be granted a waiver is whether it has shown such special circumstances as individualized hardship or inequity that warrant deviation from the Commission's network disclosure rules and whether such deviation better serves the public interest.

23. We conclude that NYNEX has not made a showing sufficient to warrant the grant of a waiver of Section 64.702(d)(2) and Section 68.110. Our disclosure requirements ensure that telecommunications manufacturers, vendors and providers can obtain, on a nondiscriminatory basis, technical and marketing information about any new or modified network interface or service affecting interconnection to the network.[48] The Commission has recognized that without a network disclosure requirement, including the associated time periods, a Bell Operating Company can act on its incentive and ability to withhold information to the detriment of competition and the communications consumers in that competitive market.[49] The hardship NYNEX alleges is no different than that imposed on any carrier subject to our network disclosure requirements. NYNEX fails to demonstrate any special circumstances that warrant deviation from the rule. The six-month period during which NYNEX may not offer the new service constitutes a major element of the public interest benefit of the rule, by providing competitors time to begin production of competitive alternatives. NYNEX has not demonstrated that a deviation from the rule would better serve this public interest basis. We conclude that strict compliance with the network disclosure six-month requirement is completely consistent with the public interest. In fact, the make/buy point has passed and NYNEX has been providing service using the Newbridge multiplexers (and the new network interface) for more than nine months. Accordingly, in comparison to the normal operation of the network disclosure rules, NYNEX and Newbridge have already received a substantial competitive advantage, and CPE competitors are at a significant disadvantage. Furthermore, the interim provisions, as expanded by this order, effectively mitigate any demonstrable hardship to NYNEX, its customers and Newbridge.

24. Although we cannot at this point correct this imbalance, we can mitigate further inequity. We therefore direct NYNEX to limit its marketing efforts related to interstate Enterprise service offerings to Enterprise service offerings that fully comply with the provisions of this order. Specifically, any marketing of Enterprise service offerings must make clear that unbundled service offerings are not currently available and will be subject to regulatory review once they are developed.[50] This marketing restriction shall run from the day after the date of release of this order until the expiration of the six-month network disclosure period.

IV. NYNEX'S PETITION FOR STAY FILED WITH THE COMMISSION

25. NYNEX's request for stay of the *Review Order* filed with the Commission raises the same issues presented to the U.S. Court of Appeals. The court granted that stay on the same subject matter. Accordingly, NYNEX's petitions for stay, and IDCMA's responses are dismissed as moot.

V. ORDERING CLAUSES

26. Accordingly, IT IS ORDERED, that pursuant to authority contained in Section 4 of the Communications Act of 1934, as amended, 47 U.S.C. § 154, the interim provisions of the *Review Order* ARE HEREBY EXTENDED to include customers for whom orders, in the form of Access Service Requests are signed by the customer and on file with NYNEX as of the date of release of this

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[42] *See* Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3.

[43] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d 1164, 1166 (D.C. Cir. 1990).

[44] *WAIT Radio v. FCC*,, 418 F.2d 1153, 1157, 1159 (D.C. Cir. 1969), *cert. denied*, 409 U.S. 1027 (1972) (an agency's obligation to give meaningful consideration to waiver applications does not contemplate that agency must or should tolerate evisceration of a rule by waivers).

[45] *WAIT Radio*, 418 F.2d at 1158.

[46] *See Northeast Cellular*, 897 F.2d at 1166, *citing WAIT Radio v. FCC*, 418 F.2d 1153, and *Industrial Broadcasting Co. v. FCC*, 437 F.2d 680 (D.C. Cir. 1970). *See e.g.*, In the Matter of Transport Rate Structure and Pricing, *Report and Order and Further Notice of Proposed Rulemaking*, CC Docket No. 91-213, 8 FCC Rcd 7006, 7069-70 (paras. 150-151) (1992).

[47] *Northeast Cellular Tel. Co. v. FCC*, 897 F.2d at 1166 (grant of waiver vacated and remanded for failure of FCC to articulate any standard by which underlying policy could be determined; record revealed nothing unique about applicant's situation).

[48] *See* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, 2 FCC Rcd 143, 150-51, *on recon.*, 3 FCC Rcd 22, 23-24 (1987). *See also* Policy and Rules Concerning the Furnishing of Customer Premises Equipment, Enhanced Services and Cellular Communications Equipment by the Bell Operating Companies, 95 FCC 2d 1117, 1135 (1984), *aff'd sub nom. Illinois Bell Telephone Co. v. FCC*, 740 F.2d 465 (7th Cir. 1984), *aff'd on. recon.*, FCC 84-252, 49 Fed. Reg. 26056 (1984), *aff'd sub nom North American Telecommunications Association v. FCC*, 772 F.2d 1282 (7th Cir. 1985); Computer and Business Equipment Manufacturers Association, 93 FCC 2d 1226, 1227, (1983) (*CBEMA*).

[49] *See CBEMA*, 93 FCC 2d at 1230, *citing* Amendment of Section 64.702 of the Commission's Rules and Regulations, [recon 84 FCC 2d 50 at para. 95 (1980)].

[50] *See* n.24.

order, and to customers receiving Enterprise service under New York Telephone Company Tariff P.S.C. No. 900 on or before the date of release of this order.

27. IT IS FURTHER ORDERED, that the Emergency Application for Stay and Supplemental Application for Stay filed by the NYNEX Telephone Companies and the Opposition to Emergency Application for Stay and Consolidated Response to NYNEX's Supplemental Application for Stay and Petition for Waiver, filed by the Independent Data Communications Manufacturers Association, Inc., ARE DISMISSED AS MOOT.

28. IT IS FURTHER ORDERED, that the Motion for Leave to File Out of Time, filed by the Independent Data Communications Manufacturers Association, IS GRANTED.

29. IT IS FURTHER ORDERED, that pursuant to Section 1.3 of the Commission's Rules, 47 C.F.R. § 1.3, the Petition for Waiver, filed by the NYNEX Telephone Companies, IS DENIED.

30. IT IS FURTHER ORDERED, that the NYNEX Telephone Companies SHALL limit its marketing efforts related to interstate Enterprise service offerings to unbundled Enterprise service offerings that fully comply with the provisions of this order from the day after the date of release of this order until the expiration of the six-month network disclosure period.

31. IT IS FURTHER ORDERED, that for the above purposes Section 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58, 61.59, ARE WAIVED and Special Permission No. 94-344 is assigned. This filing shall be made on not less than one day's notice, and shall be made not more than five days after the release date of this order.

32. IT IS FURTHER ORDERED, that the Office of the General Counsel IS DIRECTED to petition the U.S. Court of Appeals for the District of Columbia Circuit to lift its Order of November 8, 1993 (No. 93-1734) which stayed the Commission's October 29, 1993 Order in this proceeding.

33. IT IS FURTHER ORDERED, that this Order SHALL BECOME EFFECTIVE upon the lifting of the stay by the U.S. Court of Appeals for the District of Columbia Circuit.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

TELEDATA INTERNATIONAL, INC. File No. I-T-C-93-274

Application for authority to acquire and operate facilities for IBS, Datanet and television service and for service between the U.S. and Somalia.

ORDER, AUTHORIZATION AND CERTIFICATE

Adopted: March 16, 1994; Released: March 28, 1994

By the Chief, International Facilities Division:

1. Upon consideration of the above-captioned uncontested application, filed pursuant to Section 214 of the Communications Act of 1934, as amended, IT IS HEREBY CERTIFIED that the present and future public convenience and necessity require the provision of INTELSAT Business Service (IBS), DataNet Service, International Television Service and switched voice service between the U.S. and Somalia by TeleData International, Inc. (TDI).

2. Accordingly, IT IS ORDERED that application File No. I-T-C-93-274 IS GRANTED, and TDI is authorized to:

a. lease from Comsat and operate ten (10) 64-kbps satellite circuits between the Washington International Teleport (WIT) earth station and an appropriate INTELSAT satellite over the Atlantic Ocean Region (AOR), connecting with similar circuits between the satellite and an earth station in Somalia, furnished by TDI's correspondent in Somalia;[1]

b. lease and operate 10 64-kbps circuits in the WIT earth station;

c. lease and operate necessary domestic connecting facilities; and

d. use the facilities in a, b and c above to provide international switched voice, private line services, IBS, Datanet Service, and International Television Service between the U.S. and Somalia.

3. IT IS FURTHER ORDERED that the authority granted herein for TDI to establish channels of communication between a WIT earth station and INTELSAT satellites does not dispense with the requirement that any earth station TDI may use in the future for this service shall be authorized under Title III of the Communications Act of 1934, as amended, to communicate with those satellites.

4. IT IS FURTHER ORDERED that no material changes inconsistent with this or any other relevant Commission order shall be made before final execution of an operating agreement between TDI and its correspondent, and a copy of the agreement shall be filed with the Commission within 30 days of its execution.

5. IT IS FURTHER ORDERED that our authorization of TDI to provide private lines is limited to the provision of such private lines only between the United States and Somalia -- that is, private lines which originate in the United States and terminate in Somalia or which originate in Somalia and terminate in the United States. In addition, TDI may not -- and TDI's tariff must state that TDI's customers may not -- connect private lines provided over these facilities to the public switched network at either the U.S. or foreign end, or both, for the provision of international switched services, unless authorized to do so by the Commission upon a finding that the foreign administration affords resale opportunities equivalent to those available under U.S. law, in accordance with *Regulation of International Accounting Rates*, Phase II, First Report and Order, 7 FCC Rcd 559 (1991), and *Order on Reconsideration and Third Further Notice of Proposed Rulemaking*, 7 FCC Rcd 7927 (1992), *petition for reconsideration pending*.

6. IT IS FURTHER ORDERED that neither TDI nor any persons or companies directly or indirectly controlling or controlled by TDI, or under direct or indirect common control with it, shall acquire or enjoy any right, for the purposes of handling or interchanging traffic to or from the United States, its territories or possessions, which is denied to any other United States carrier by reason of any concession, contract, understanding, or working arrangement to which TDI or any persons or companies controlling or controlled by TDI are parties.

7. IT IS FURTHER ORDERED that the applicant shall file a tariff pursuant to Section 203 of the Communications Act, 47 U.S.C. Section 203, and Part 61 of the Commission's Rules, 47 C.F.R. Part 61, for the service authorized in this Order.

8. IT IS FURTHER ORDERED that the applicant shall file the annual reports of overseas telecommunications traffic required by Section 43.61 of the Commission's Rules, 47 C.F.R. §43.61.

9. IT IS FURTHER ORDERED that the applicant shall file semi-annual circuit reports pursuant to Section 63.15(b) of the Commission's Rules, 47 C.F.R. §63.15(b).

10. IT IS FURTHER ORDERED that this authorization is subject to the continued effectiveness of UNOSOM's authorization for TDI to provide service between the U.S. and Somalia.

11. The Commission retains jurisdiction over this matter to reallocate circuits in the satellite system among the various international common carriers and other authorized users as required to ensure nondiscriminatory use of, and equitable access to, the communications satellite system.

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[1] At present there is no recognized government in Somalia. The State Department has informed the Commission that authorization from United Nations Operations in Somalia (UNOSOM) will suffice for purposes of enabling communications to be provided between the U.S. and Somalia. By letter dated February 8, 1994, TDI submitted a copy of its contract with UNOSOM.

12. This order is issued under Section 0.291 of the Commission's Rules and is effective upon adoption. Petitions for reconsideration under Section 1.106 or applications for review under Section 1.115 of the Commission's Rules may be filed within 30 days of the date of public notice of this order (*see* Section 1.4(b)(2)).

FEDERAL COMMUNICATIONS COMMISSION

George S. Li
Chief, International Facilities Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Southwestern Bell Telephone Company — Transmittal No. 2312

Revisions to
Tariff F.C.C. No. 73

ORDER

Adopted: March 22, 1994; Released: March 23, 1994

By the Acting Chief, Common Carrier Bureau:

I. INTRODUCTION AND BACKGROUND

1. On November 24, 1993, Southwestern Bell Telephone Company (SWBT) filed Transmittal No. 2312 to revise its Tariff F.C.C. No. 73. This transmittal would allow SWBT to offer promotional arrangements that would provide discounts on recurring charges, or discounts or waivers of nonrecurring charges.[1] Tariff F.C.C. No. 73 at 2nd Revised Page 7-68.

2. SWBT asserts that Transmittal No. 2312 is similar to Section 4.1.1 of Teleport Communications Group's (TCG's) tariff,[2] which the Common Carrier Bureau (Bureau) allowed to take effect. SWBT complains that the Bureau rejected the requests of SWBT, the Bell Atlantic Telephone Companies (Bell Atlantic), and the New York Telephone Company and the New England Telephone and Telegraph Company to investigate TCG's tariff and those filed by a number of other nondominant carriers.[3] In particular, protests SWBT, the Bureau did not address SWBT's and Bell Atlantic's arguments specifically, but asserted that the parties to the proceedings had not demonstrated a basis for initiating a proceeding to determine the lawfulness of TCG's tariff. Description and Justification at 1-2.

3. SWBT declares that it wishes to take advantage of the flexibility that TCG and the other nondominant carriers have. SWBT maintains that if it is not allowed the same flexibility as TCG to offer promotional arrangements, the Commission will be denying SWBT its constitutional right to equal protection under the law. SWBT states that it plans to rely upon its modified language to allow for promotional arrangements "on the same basis as TCG." D&J at 2. Transmittal No. 2312 is scheduled to become effective March 24, 1994.

4. On December 9, 1993, MCI Telecommunications Corporation (MCI) and Sprint Communications Company LP (Sprint) filed petitions to reject Transmittal No. 2312, while MFS Communications Company, Inc. (MFS) filed a petition to clarify or, in the alternative, to reject Transmittal No. 2312. SWBT replied on December 9, 1993. For the reasons discussed below, the Bureau rejects Transmittal No. 2312.

II. SUMMARY OF PLEADINGS

A. Petitions

5. MFS contends that SWBT's proposed tariff language is unlawfully vague and ambiguous because it appears to allow SWBT to offer service at rates not reflected in the tariff. MFS urges the Commission to require SWBT to clarify Transmittal No. 2312 to indicate that SWBT will tariff all its rates in compliance with the Communications Act and the Commission's Rules. Absent such clarification, MFS urges the Commission to reject Transmittal No. 2312. MFS Petition at 2-3.

6. MCI and Sprint contend that Transmittal No. 2312 would allow SWBT to charge similarly situated users different rates for the same currently tariffed, generally available access services. These revisions, argue MCI and Sprint, are unreasonably discriminatory in violation of Section 202(a) of the Communications Act, 47 U.S.C. § 202(a), and should be rejected. MCI Petition at 2-3; Sprint Petition at 2. Moreover, MCI argues that this filing violates the Commission's restrictions on ICB pricing by local exchange carriers (LECs). MCI Petition at 4 (*citing* Local Exchange Carriers' Individual Case Basis DS3 Service Offerings, CC Docket No. 88-136, GTE Telephone Operating Companies, CC Docket No. 89-305, Revisions to Tariff F.C.C. No. 1, 4 FCC Rcd 8634 (1989) (*DS3 ICB Order). See also* MFS Petition at 3.

7. MCI also notes that the Commission previously rejected SWBT's argument that it is entitled, under the equal protection provisions of the U.S. Constitution, to the same pricing flexibility as SWBT's nondominant competitors. MCI Petition at 6-7 (*citing, inter alia,* Tariff Filing Requirements for Nondominant Common Carriers, 8 FCC Rcd 6752, 6754 at n.21 (1993)(*Nondominant Carrier Tariff Order). See also* Sprint Petition at 2, incorporating by reference Sprint Petition against SWBT Transmittal No. 2297 at 2-3 (*citing* Policies and Rules Concerning Rates for Competitive Common Carrier Services and Facilities Authorized Therefor, First Report and Order, 85 FCC 2d 1, 12-20 (1980).

8. MCI further argues that Transmittal No. 2312 would violate the pricing flexibility the Commission established in the price cap rules and in the expanded interconnection proceedings. MCI at 4-5 (*citing* Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Transport Phase I, Second Report and Order and

[1] Section 7.2.22 provides: "The Telephone Company may, from time to time, institute promotional arrangements which involve discounts on recurring charges, or discounts or waivers of nonrecurring charges. Discounts based on volume, term, or promotional arrangements may, therefore, result in charges below the stated rates in particular circumstances."

[2] TCG Tariff F.C.C. No. 1, Transmittal No. 3 (filed Oct. 21, 1993).

[3] *Teleport Communications Group Operating Companies, Tariff F.C.C. No. 1, Transmittal No. 1, et al.,* 8 FCC Rcd 3611 (Com. Car. Bur. 1993) (*TCG Tariff Order), app. rev. pend.,* Application for Review of Southwestern Bell Telephone Company (filed June 10, 1993) (parties did not demonstrate a basis for initiating rejection or investigation of a tariff already in effect).

Third Notice of Proposed Rulemaking, 8 FCC Rcd 7374, paras. 90-94 (1993) (*Switched Transport Expanded Interconnection Order)* (Commission grants LECs additional flexibility in the form of zone density pricing, and volume and term discounts, but does not grant LECs' requests to offer contract pricing). MCI finally argues that allowing dominant carriers the flexibility that the instant tariff proposes would have an adverse effect on developing competition in the interexchange and local exchange access markets. *Id.* at 4-5.

B. Reply

9. SWBT denies that its tariff is vague and misleading. Indeed, SWBT emphasizes that MFS includes similar language in its tariff.[4] Moreover, contends SWBT, because it has not yet proposed to offer any "promotional arrangements" pursuant to the pending tariff language, it is premature to reject Transmittal No. 2312 on the grounds that the revised provision will result in unreasonable discrimination. SWBT Reply at 4-5.

10. Similarly, since SWBT has not yet proposed a specific promotion, it denies that Transmittal No. 2312 violates the *DS3 ICB Order.* Moreover, SWBT asserts that the *DS3 ICB Order* does not appear to preclude LECs from all future efforts toward pricing flexibility. *Id.* at 3 (incorporating by reference SWBT's Reply to Petitions against SWBT Transmittal No. 2297). SWBT further argues that although the *DS3 ICB Order* ruled on the reasonableness of LEC ICB rates and charges for special access DS3 and DS3-equivalent service, it did not directly address the reasonableness of promotional rates. *Id.* at 3-4 (*citing DS3 ICB Order,* 4 FCC Rcd at 8634, para. 1). According to SWBT, MCI made "no attempt to harmonize" its argument -- that the *DS3 ICB Order* prohibits SWBT's promotional language -- with the "reasoning of" the *TCG Tariff Order.*[5] *Id.* at 4. Finally, SWBT denies that allowing dominant carriers the same tariffing flexibility as nondominant carriers would have an adverse effect on developing competition in the interexchange and local exchange access markets. *Id.* at 5-6.

III. DISCUSSION

11. As an initial matter, the tariff language proposed in Transmittal No. 2312 is unclear and ambiguous in violation of Section 61.2 of the Commission's Rules, 47 C.F.R. § 61.2. Section 61.2 requires that tariff publications contain clear and explicit explanatory statements regarding the rates and regulations contained in a tariff. In addition, Section 61.54(j) of the Rules, 47 C.F.R. § 61.54(j), requires that general rules (including definitions), regulations, exceptions and conditions that govern the tariff must be stated clearly and definitely. The tariff language in Transmittal No. 2312 violates both of these rules. It is impossible to discern from that language how SWBT would exercise its discretion in establishing a promotional arrangement or the class of customers to which it would provide service. Moreover, it is not clear whether SWBT would file tariffs for these proposed promotional arrangements. Section 61.1 of the Commission's Rules, 47 C.F.R. § 61.1, states that failure to comply with any provisions of Part 61 may be grounds for rejection of the non-complying provisions. Because the mechanism for providing service, as well as the specific services that would or would not be provided, are unclear, we reject Transmittal No. 2312 as violative of Part 61 of the Commission's Rules.

12. Although SWBT argues that it should be allowed the same tariffing flexibility as TCG, it cites no Commission precedent to support this claim. Because they lack market power, nondominant carriers such as TCG are subject to streamlined tariff regulation -- their tariffs are presumptively lawful, may be filed on one day's notice, and without cost support information.[6] TCG's tariff was permitted to take effect pursuant to these requirements. SWBT, however, is a dominant carrier whose tariffs are subject to a higher level of scrutiny. As explained above, Transmittal No. 2312 violates the Commission's Rules and is rejected.

13. We also find that SWBT's constitutional challenge is insufficient to justify the instant tariff filing. The Commission has previously found that the dominant/nondominant regulatory classification does not violate any constitutional "equal protection" guarantee.[7] For the reasons explained above, SWBT's Transmittal No. 2312 violates Sections 61.2 and 61.45(j), is patently unlawful, and is rejected.

IV. ORDERING CLAUSES

14. Therefore, IT IS ORDERED that, pursuant to Section 61.1 of the Commission's Rules, 47 C.F.R. Part 61.1, the tariff revisions filed by Southwestern Bell Telephone Company in Tariff F.C.C. No. 73, Transmittal No. 2312, ARE REJECTED.

15. IT IS FURTHER ORDERED that Southwestern Bell Telephone Company SHALL FILE tariff revisions to become effective on one day's notice, no later than five business days from the release of this Order, in order to remove the rejected materials and reinstate the currently effective material.

16. IT IS FURTHER ORDERED that, for these purposes, we waive Sections 61.58 and 61.59 of the Commission's Rules, 47 C.F.R. §§ 61.58 and 61.59. Southwestern Bell Telephone Company should cite the "DA" number of the instant Order as the authority for this filing.

17. IT IS FURTHER ORDERED that the petitions to reject Southwestern Bell Tariff F.C.C. No. 73, Transmittal No. 2312, filed by MCI Telecommunications Corporation and Sprint Communications Company LP ARE GRANTED.

18. IT IS FURTHER ORDERED that the petition to clarify or, in the alternative, to reject Southwestern Bell Tariff F.C.C. No. 73, Transmittal No. 2312, filed by MFS Communications Company, Inc. IS GRANTED.

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[4] Section 2.7.1 provides: "The Company reserves the right, from time to time, to provide promotional offerings." MFS Tariff F.C.C. No. 1, Transmittal No. 1 (filed Feb. 22, 1993).

[5] *TCG Tariff Order, supra,* at n.3.

[6] *Nondominant Carrier Tariff Order,* 8 FCC Rcd at 6755.

[7] *Id.* at 6754, n.21.

FEDERAL COMMUNICATIONS COMMISSION

A. Richard Metzger, Jr.
Acting Chief, Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

LITEL TELECOMMUNICATIONS CORPORATION d/b/a LCI INTERNATIONAL, Complainant,

v.

U S WEST COMMUNICATIONS, INC.,	File No. E-92-119
CINCINNATI BELL TELEPHONE COMPANY, and	File No. E-92-120
NEW YORK TELEPHONE COMPANY,	File No. E-92-122

Defendants.

MEMORANDUM OPINION AND ORDER

Adopted: March 7, 1994; Released: March 29, 1994

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that LiTel Telecommunications Corporation d/b/a LCI International (LiTel) in these consolidated Section 208 proceedings,[1] has met its burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act of 1934, as amended, (the "Act"),[2] by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1989 through December 31, 1990. In addition, we award monetary damages, plus interest computed at the relevant Internal Revenue Service (IRS) rate compounded daily, to LiTel where it has successfully shown that it incurred actual damages as a consequence of the defendants' violations.

II. BACKGROUND

2. In 1992, LiTel filed complaints alleging, *inter alia*, violations of the Commission's prescription for the January 1, 1989 through December 31, 1990 monitoring period by the defendants.[3] After the completion of discovery, LiTel filed motions to supplement the record with its damages calculations.[4] In addition, both LiTel and the defendants filed briefs and reply briefs.[5] The issues presented in these consolidated complaint proceedings are virtually identical to those presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[6] In that proceeding, we held that LEC rates that pro-

[1] Due to the similarity of the issues and arguments raised by the various parties, the proceedings have been consolidated for disposition.

[2] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

[3] The defendants all filed answers and several defendants filed motions to dismiss.

[4] LiTel filed a motion to supplement the record in every proceeding except in the proceeding involving Cincinnati Bell Telephone Company (CBT). U S West Communications, Inc. (USWC) and New York Telephone Company (NYT) both opposed LiTel's motion. LiTel filed motions to reply to USWC's and NYT's oppositions. We will grant LiTel's motions for filing in the interest of compiling a full and complete record and because the parties have had ample opportunity to respond to the damages calculations submitted. LiTel's supplements (Supp.) will be indicated by file number (*e.g.*, LiTel Supp., File No. E-92-119).

[5] LiTel's briefs (Br.) and reply briefs (RBr.) will be indicated by file number (*e.g.*, LiTel Br., File No. E-92-119). Defendants' briefs (Br.) and reply briefs (RBr.) will be indicated by party (*e.g.*, USWC Br.).

[6] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly "*MCI Liability Orders*"), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Tel. and Tel. Co. v. Northwestern Bell Tel. Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

duced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act. We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[7]

III. DISCUSSION

A. Liability For Damages

1. Contentions of the Parties

3. LiTel alleges that the rates it paid for certain of the defendants' interstate access services during the period from January 1, 1989 through December 31, 1990 were unjust and unreasonable in violation of Section 201(b) of the Act. LiTel supports its allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that the defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[8]

4. LiTel requests that the Commission declare that the defendants' charges for the period from January 1, 1989 through December 31, 1990 are in violation of the rate of return prescription and Section 201(b) of the Act and order the defendants to pay damages to LiTel equal to the difference between the amount actually paid by LiTel for interstate access service during the period and the amount that LiTel would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

5. The defendants advance a number of arguments to support their claims that they cannot be held liable for damages based solely on the fact that their rates produced earnings in excess of the Commission's prescribed rate of return.[9] The defendants first argue that LiTel has failed to state a cause of action under Section 208 of the Act. The defendants contend that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order; and most argue that even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall."[10]

6. To bolster this argument, the majority of the defendants argue that the complaints are barred by the D.C. Circuit's decision in *American Telephone & Telegraph Co. v. FCC*[11] and a later decision by the Sixth Circuit in *Ohio Bell Telephone Co. v. FCC*.[12] All of the defendants contend that recasting what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure that effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup earning shortfalls. The majority of the defendants argue that consistent with *AT&T v. FCC*, the Commission must consider a carrier's overall earnings in determining whether a carrier's category earnings levels are in violation of the Act. Therefore, these defendants maintain that to the extent that their earnings for overall interstate access services did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of the earnings realized in individual access service categories. In addition, these defendants contend that the court's decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot entertain complaints for damages based on category-level interstate access overearnings. CBT maintains that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

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[7] MCI Telecommunications Corp. v. Pacific Bell Tel. Co., 8 FCC Rcd 1517 (1993) (*MCI Damages Order*), *appeals docketed sub nom. MCI Telecommunications Corp. v. FCC*, No. 93-1166 *et al.* (D.C. Cir. Feb. 18, 1993). *See also* AT&T Communications v. Northwestern Bell Tel. Co., 8 FCC Rcd 1014 (1993) (*AT&T Damages Order*), *appeal docketed sub nom. U S WEST Communications, Inc. v. FCC*, No. 93-1223 (D.C. Cir. Mar. 22, 1993).

[8] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47C.F.R. § 65.702. The rates of return reported for the various defendants on their Forms 492 for the 1989-1990 monitoring period are set forth in Appendix A.

[9] The arguments and claims made by the defendants are, for the most part, identical in their essentials. For convenience and clarity, we refer to the defendants' arguments as if they were part of the same pleadings. To the extent that individual defendants make unique or separate arguments, we address them accordingly.

[10] *See, e.g.*, NYT Br. at 10.

[11] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*).

[12] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). In *AT&T v. FCC*, the court invalidated the Commission's procedure designed to enforce its rate of return prescriptions through the automatic refund of carrier overearnings to customers. In *Ohio Bell*, the court, relying on *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both floor and ceiling on carrier earnings. *Id.*, 949 F.2d at 878, citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission, however, has since clarified that it does not view a rate of return prescription as both a minimum and maximum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990); *petition for review denied sub nom. Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993).

7. Some of the defendants next contend that the Commission has no authority to order a refund retroactively apart from Sections 204 and 205 of the Act.[13] USWC further contends that any Commission order requiring a carrier to make refunds solely because the carrier has exceeded the authorized rate of return would constitute unlawful retroactive ratemaking.[14] USWC maintains that rates charged in conformity with a lawfully filed tariff cannot then be found to be unjust and unreasonable merely because they later proved to be too profitable.[15] According to USWC, earnings in excess of a prescribed rate of return cannot establish a violation of the Act, rather LiTel must demonstrate that USWC's rates are unjust and unreasonable.[16]

8. CBT makes the additional claim that the complaints are barred because the rates at issue were prescribed by the Commission and cannot be subject to refunds or damage claims.[17] CBT argues that even if its rates were not actually prescribed, CBT was required to charge the rate under the filed rate doctrine.

2. Discussion

9. We have carefully examined the record before us and conclude that, for the most part, defendants' arguments are the same ones that we considered and rejected in the *MCI Liability Orders*. The defendants have cited no facts and have made no arguments here that would warrant a different ruling.

10. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the defendants there that earnings in excess of a prescribed rate of return do not establish a cause of action under the Act. We held that *AT&T v. FCC*, the principal case authority relied upon by the defendants, establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[18] Specifically, we stated that

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
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> * * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[19]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[20]

11. *AT&T v. FCC and Ohio Bell:* The defendants' claims that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss the complaints have no merit. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a violation of the Act and actual injury.[21] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages; and their holdings are not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that the defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[22]

12. *Defendants' Other Arguments.* CBT's argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[23] CBT has raised no new issues or arguments that would persuade us to depart from our holdings. We also held in the *MCI Liability Order* that enforcement of a rate of return prescription is not retroactive ratemaking because the obligation being enforced was set prospectively when the prescription was adopted.[24] The defendants have not persuaded us to alter our decision. We have also rejected the

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[13] *See, e.g.*, CBT Br. at 8. NYT argues that under a court decision, *Illinois Bell Tel. Co. v. FCC*, 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*), the Commission cannot order refunds unless it has first suspended rates under § 204. *See* NYT Br. at 8. We reject the NYT's claim that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order*, *Illinois Bell* addresses the Commission's authority under Section 204, not Section 208. *See MCI Damages Order*, 8 FCC Rcd at 1524-25, para. 27. The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

[14] USWC Br. at 4-5.

[15] *Id.* at 2.

[16] *Id.* at 3.

[17] *See* CBT Br. at 7-8.

[18] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[19] *Id.* at 223 [emphasis in the original; footnote omitted].

[20] *Id.*

[21] *See id.* at 222-23, para. 55.

[22] *Id.* at 226, para. 86.

[23] *See id.* at 223-24.

[24] *Id.* at 222.

contention that rates charged in conformity with a lawfully filed tariff cannot be unjust and unreasonable.[25] As we stated in the *MCI Liability Order*, "legally effective, carrier-initiated tariffs can always be challenged as unreasonable and unlawful."[26] The issue raised by these complaints is not the lawfulness of high profits in the abstract, but the lawfulness of profits in excess of a prescription. Accordingly we hold that, taking into account the buffer, profits in excess of a prescription are unjust and unreasonable.

B. Damages and Interest Claims

1. Damages

a. Contentions of the Parties

13. LiTel's damages claims rest primarily on the contention that the proper measure of damages incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts LiTel actually paid the defendants for interstate access services during the January 1, 1989 through December 31, 1990 monitoring period and the amount it would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription.[27] The damages amounts claimed by LiTel from the various defendants based on this measure are set forth in Appendix B.

14. The defendants challenge LiTel's damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. The defendants contend that by simply basing its damages claims on a calculation of its prorated share of each of the defendants' category-level overearnings, LiTel asks the Commission to award it damages in the same amounts it would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[28] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*. A number of the defendants add that the decision of the court in *Illinois Bell* also establishes that the Commission has no authority to award refunds if it has not first suspended the applicable rates under Section 204 of the Act.[29] These defendants argue that because the Commission never issued an accounting order pursuant to Section 204, the Commission has no authority to order refunds of those rates, regardless of whether it labels them refunds or damages.[30]

15. The defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, LiTel's damages claims still fail because the complaints do not establish a valid cause of action. According to the defendants, to pursue a damages claim, LiTel must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that the defendants' rates produced excessive returns in individual service categories.[31] Moreover, the defendants argue, Section 206 of the Act[32] requires LiTel to prove injury, causation, and the specific amount of damages sought, in addition to establishing a violation of the Act.[33] The defendants maintain that by simply referencing the defendants' earned rates of return for individual access service categories, LiTel has not only failed to allege any facts that would establish that the defendants' rates were unjust and unreasonable during the period in question but have also failed to show that they sustained actual damage as a result of those rates."[34]

16. USWC also contends that an award of damages to LiTel based on carrier overearnings is inappropriate for equitable and policy reasons.[35] USWC argues that LiTel is

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[25] *Id.*

[26] *Id.* at 222, quoting *Arizona Grocery v. Atchison, T & S.F.R. Co.*, 284 U.S. 370, 384 (1932).

[27] LiTel Br., File No. E-92-119, at 10, citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918).

[28] *See, e.g.*, NYT Br. at 5. The defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful.

[29] *See, e.g.*, NYT Br. at 8.

[30] *See, e.g.*, NYT Br. at 8.

[31] The defendants argue that LiTel must specify identifiable rates that they paid that were too high or too low. *See, e.g.*, USWC Br. at 7-8. These defendants cite to a 1970 circuit court decision to support the claim that where retroactive relief is ordered for rates paid pursuant to a tariff that is subsequently found unjust and unreasonable, the Commission must determine what is a just and reasonable rate. *Id.* at 8, citing to *Middlewest Motor Freight Bureau v. United States*, 433 F.2d 212, 232 (8th Cir. 1970) (*Middlewest*), *cert. denied*, 402 U.S. 999 (1971). As we determined in the *MCI Damages Order*, the defendants' reliance on *Middlewest* is misplaced. *MCI Damages Order*, 8 FCC Rcd at 1522, n.57.

[32] *See* 47 U.S.C. § 206.

[33] *See, e.g.*, NYT Br. at 10-11.

[34] *See, e.g.*, USWC Br. at 8-9. The defendants contend that the principle that LiTel must still prove it was damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act. In *Seaboard*, the Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a) [204], a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) [208] rather than on the carrier, who would have borne it in a § 15(8)(a) [204] proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) [208] to actual damages rather than the full refund of overcharges available under § 15(8)(a) [204].

The defendants contend that this ruling has been found applicable to proceedings under the Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34. Here too, as we determined in the *MCI Damages Order*, the defendants' reliance on case precedent is misplaced. *MCI Damages Order*, 8 FCC Rcd at 1522, n.60.

[35] *See, e.g.*, USWC Br. at 10-11. USWC argues that LiTel must plead its case in equity and the Commission may only award a refund if we find that the public interest will be served by a refund to LiTel. USWC contends that the leading case in this area is *Moss v. Civil Aeronautics Board*, 521 F.2d 298 (D.C. Cir. 1975) (*Moss*), *cert. denied sub nom. Roberts v. Civil Aeronautics Board*, 424 U.S. 966 (1976), *reh'g denied*, 425 U.S. 966 (1976). USWC states that the refund in *Moss* "was governed by the equitable principles governing the law of restitution." USWC Br. at 14, citing to *Moss*, 521 F.2d at 304. We addressed this argument in the *MCI Damages Order* and found USWC's reliance on *Moss* to be misplaced. *MCI Damages Order*, 8 FCC Rcd at 1523, n.61.

actually seeking restitution or a refund of tariffed charges, not damages. USWC maintains that regardless of how LiTel characterizes the relief it seeks, any form of refund or restitution to LiTel would be contrary to the public interest.[36]

17. Some defendants further contend that LiTel's claims for damages are flawed because LiTel simply assumes that lower rates would have produced lower earnings and offers no probative evidence to show what a reasonable rate would have been or to otherwise support its damages claims. The defendants claim, in effect, that LiTel would receive windfalls if it has passed the "overcharges" on to its customers and is now awarded damages.[37] NYT argues, for example, that had its access charges to LiTel been lower in 1989-1990, it is almost certain that LiTel's rates to its customers would have been lower.[38]

18. The majority of the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to LiTel based on overearnings must be reduced to the extent that LiTel purchased services from the defendants in other access categories that produced underearnings.[39] The defendants argue that without taking into account ' substantial benefits realized by LiTel by purchasing services at unreasonably low rates, LiTel would receive a windfall profit that would be inconsistent with sound principles of equity.[40]

19. In responsive pleadings, LiTel argues that the defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *AT&T Liability Order*. LiTel claims that any so-called similarities between its damages complaints and the automatic refund mechanism invalidated by the court do not transform the private complaint remedy under Section 208 of the Act into a public enforcement refund remedy subject to entirely different standards and requirements as alleged by the defendants.[41] LiTel adds that the defendants' claims that it has failed to allege and prove violations of the Act and actual damage as a result of those violations are unfounded. LiTel maintains that it has successfully shown injury and causation arising from its payment of excessive rates for services purchased from the defendants during the relevant period.[42] LiTel asserts that its damages are the excessive charges that it paid.

20. LiTel also contends that the defendants' offset claims should be rejected because the Commission has already held that cross-subsidies between access service categories are impermissible. In addition, LiTel contends that offsets are in the nature of counterclaims by the defendant carriers, and as such, are not within the Commission's jurisdiction because they would involve the determination of a carrier's rights against a customer.[43] LiTel adds that offsets would violate the filed-rate doctrine because the defendants would, in effect, be allowed to recoup undercharges through retroactive rate adjustments thereby charging rates that are not on file.[44]

b. Discussion

21. *AT&T v. FCC, Ohio Bell, and Illinois Bell:* The defendants' claims that the holdings in *AT&T v. FCC, Ohio Bell,* and *Illinois Bell* control these proceedings and bar awards of damages based on earnings in excess of prescribed rate of return were previously raised by several of these same defendants and discussed at length in the *MCI Liability Order* and the *MCI Damages Order* (jointly *"MCI Orders"*).[45] We find these arguments to be without merit for the reasons stated in the *MCI Orders* and they require no further discussion here.

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[36] *See, e.g.,* USWC Br. at 10-16. In addition, USWC argues that an award of damages to LiTel would reward LiTel for engaging in unlawful conduct, *i.e.,* the provision of untariffed interstate access service in violation of Section 203 of the Act. USWC Br. 14-15. USWC also argues that an award of damages here would punish USWC for operating more efficiently than anticipated when USWC filed its tariffs. USWC contends that it "did not spend enough money in 1989-90 to keep its reported return low enough to satisfy the FCC's prescription." USWC Br. at 15-16. We find these arguments unavailing. The question here is whether LiTel was damaged by USWC, not whether LiTel offered allegedly untariffed services. In addition, we find USWC's contention that it will be punished for not spending enough money is without merit. USWC had ample opportunity to adjust its rates during the monitoring period in order to achieve the appropriate rate of return. It cannot attempt to avoid responsibility for its unlawful rates by claiming it simply did not spend enough money in 1989 and 1990.

[37] *See, e.g.,* USWC Br. at 15.

[38] *See* NYT Br. at 12.

[39] CBT Br. at 12-14; NYT Br. at 12-13.

[40] USWC further argues that the issue of refunds of overearnings for the 1989-1990 pre-price cap period is still unresolved and that the Commission stated that it would revisit the issue of how to reflect overearnings and refunds for that period. USWC Br. at 16 citing to Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Order on Reconsideration, 6 FCC Rcd 2637, 2691-92 (1991). CBT argues that the Commission has not yet promulgated new refund rules as suggested by the court in *AT&T v. FCC,* 836 F.2d at 1392, that would ensure that enforcement of rates of return maintains the appropriate balance between the interests of consumers and investors. CBT Br. at 5. NYT goes further arguing that in the absence of action by the Commission on the court's remand in *AT&T v. FCC,* there is no valid rule requiring refunds of earnings above either the category or interstate rates of return. NYT Br. at 5. We find these arguments unavailing. The instant complaints seek individual damages under Section 208 of the Act, not refunds under other sections of the Act, and must be dealt with on their merits.

We note the Commission has terminated CC No. Docket 84-800. *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 7 FCC Rcd 5582 (1992). The only matters that were pending in that docket after the court's remand in *AT&T v. FCC* are being addressed in Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688, 4700-2 (1992). While our determination here should not be construed as prejudging the issues and arguments presented by the parties to that proceeding, our action here is consistent with the proposals in that docket. *Id.,* 7 FCC Rcd 4702, at para. 98.

[41] *See, e.g.,* LiTel RBr., File No. E-92-120, at 5-7.

[42] *See, e.g.,* LiTel RBr., File No. E-92-122, at 12-13.

[43] *See, e.g.,* LiTel RBr., File No. E-92-122, at 14 and LiTel Br., File No. E-92-120, at 13-14., citing Illinois Bell Tel. Co. v. AT&T, 4 FCC Rcd 5628, 5270 (1989), *recon. denied,* 4 FCC Rcd 7759 (1989); Thornell Barnes Co. v. Illinois Bell Tel. Co., 1 FCC 2d 1247, 1275 (1965).

[44] *See, e.g.,* LiTel RBr., File No. E-92-119, at 15.

[45] *See MCI Liability Order,* 5 FCC Rcd at 221-23; *MCI Damages Order,* 8 FCC Rcd at 1524-25. Similarly, *New England Tel.*

22. *Section 201(b) of the Act:* The defendants' contentions that LiTel's damages claims must be dismissed because LiTel has failed to prove that the defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act have no merit. In addressing liability above, we held that LiTel met its burden of establishing that the defendants violated our rate of return prescription thereby making their rates unlawful under Section 201(b) of the Act.[46] The question now before us is not whether the defendants' rates were unjust and unreasonable but whether LiTel suffered any measurable damage as a consequence of paying rates previously determined by the Commission to be unlawful under Section 201(b).

23. The defendants claim that even if LiTel has shown that the defendants' rates were unjust and unreasonable, its damages claims must still fail because judicial precedent compels LiTel to establish what a just and reasonable rate would have been as a prerequisite to recovering damages. This argument was previously considered and rejected in the *MCI Damages Order*.[47] LiTel has shown that it purchased services from the defendants at rates that produced earnings over and above the defendants' prescribed levels. The defendants, faced with the prospect of damages for violations of a binding rate of return prescription, cannot so readily disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, the defendants would have us require LiTel to do what the defendants were neither required nor apparently able to do, that is establish the precise rates required to bring the defendants' earnings within authorized levels for each of their interstate access service categories. The defendants ask too much. Although the Commission's rate of return prescription afforded the defendants considerable leeway in setting their rates, it also bound the defendants to a maximum earnings limitation. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie. It is therefore appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels as a starting point for assessing LiTel's damages claims.

24. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that LiTel's damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to the defendants, militate against any award of damages to LiTel based on excessive earnings. The defendants argue, in effect, that the damages LiTel seeks are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to the defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[48] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

25. Consistent with our decisions in the *MCI Damages Order* and *AT&T Damages Order*, we find the defendants' arguments with respect to "passing-on" to be equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[49] The issue is not what LiTel has done in response to paying excessive rates, but whether LiTel has been damaged as a result of these excessive rates.

26. We also reject the defendants' other equitable arguments regarding impermissible windfall profits to LiTel if damages are awarded. The defendants' arguments in this regard, along with the numerous Commission and judicial precedents relied upon by the parties, were addressed in detail in the *MCI Damages Order*[50] and require no further discussion here.

27. We do find, however, that certain of the defendants have made persuasive claims for offsets based on LiTel's purchases of access services in categories in which the defendants realized earning shortfalls during the period in question. At the outset, we note that we have previously rejected the defendants' claims that the Commission is required to take into account a carrier's interstate access underearnings as well as its overearnings in determining whether a violation of the Act has occurred sufficient to sustain a Section 208 complaint.[51] We also note, however, that we have similarly rejected the notion that we lack discretion under Section 208 to consider a complainant's overall purchase of interstate access services from a defendant during a particular monitoring period in assessing the

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and Tel. Co. v. FCC, 826 F.2d 1101 (D.C. Cir. 1987) *cert. denied*, 490 U.S. 1039 (1989), does not bar an award of damages in these proceedings. *See MCI Liability Order*, 5 FCC Rcd 222-23.

[46] In the *MCI Liability Order*, we held that the complainant could prove that the defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

[47] *See MCI Damages Order*, 8 FCC Rcd at 1525, para. 29. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return. We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed rate of return are unjust and unreasonable. Accordingly, we held that the Bureau had properly determined that it is appropriate, in measuring the damage caused by the defendants' rate of return violations, to look at the difference between the amount LiTel paid for the defendants' interstate access services and the amount it would have paid if the defendants had charged rates that produced returns within the Commission's prescribed levels. *See also MCI Liability Order*, 5 FCC Rcd at 222-23 (discussing the Commission's authority under the Act to prescribe and enforce common carriers' rates of return).

[48] *See Seaboard*, 442 U.S. 444, 455, n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [§ 208] proceeding will be no different than that of a § 15(8)(a) [§ 204] proceeding in which the carrier fails to establish the reasonableness of the rate.

[49] *MCI Damages Order*, 8 FCC Rcd at 1526, para. 31. *See also AT&T Damages Order*, 8 FCC Rcd at 1020, para. 21.

[50] 8 FCC Rcd at 1526, para. 33.

[51] *MCI Liability Order*, 5 FCC Rcd at 223.

damage or injury to that complainant.[52] We continue to believe, as courts have made clear, that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly or unreasonably high.[53] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[54] Nevertheless, we believe it appropriate for purposes of assessing LiTel's damages claims to examine LiTel's overall purchase of interstate access services from the respective defendants during the monitoring period covered by the complaints.

28. Significantly, LiTel does not dispute that, in its purchases of interstate access services from the defendants, it benefitted substantially from the defendants' rates that produced underearnings in one or more access service categories. Nor does it dispute that the defendants, consistent with the Commission's rate of return prescription requirements, could have lawfully effected changes in those rates in order to bring its earnings in line with the prescription, resulting in higher charges to LiTel. Thus, while we view it as a reasonable starting point to look at the difference between the amounts LiTel paid for the defendants' access services on a category basis and the amounts it would have paid if the defendants had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by LiTel that contributed to the defendants' excessive earnings to the extent that it can be shown that LiTel benefitted from the defendants' underearnings during the relevant period.

29. In the *MCI Damages Order*, we rejected claims that (1) the Commission has no jurisdiction to allow the defendants to offset damage claims because it would, in effect, be a determination of a carrier's right against a customer;[55] (2) that the "filed rate doctrine" prohibits the allowance of offsets;[56] and (3) that allowing offsets would somehow repeal our rate of return prescription on a category basis.[57] We emphasized that the issue presented by these complaints and contested by the defendants is the extent to which LiTel has been damaged as a consequence of the defendants' violations of a binding rate of return prescription and that the focus of the complaints is not the defendants' individual interstate access rates *per se*, but the excessive earnings produced by those rates and their effect on LiTel.[58] We also rejected the contention that allowing offsets based on a complainant's purchase of access services at rates that produced underearnings results in unlawful cross-subsidization. As we stated in the *MCI Damages Order*, our decision to consider such offsets simply recognizes that although LiTel has legitimate claims for damages as a result of the defendants' violations of the rate of return prescription, LiTel enjoyed significant offsetting benefits in the form of lower rates as well.[59] LiTel has provided no new information or arguments that would persuade us to depart from our holdings. Moreover, as we emphasized in the *MCI Damages Order*, we view offsets in the complaint context as appropriate only in relation to a particular complainant's purchase of access service from a defendant carrier. A defendant would not, for example, be able to rely on undercharges to a separate customer or underearnings in general to offset a damages claim based on the measures adopted here. In particular, a complainant that takes service in only one access service category that overearned would not have received the benefit of a defendant's underearnings in access categories from which service is not taken.

30. Based upon our decision regarding the computation of damages, we award damages to LiTel as specified in Appendix C to this Memorandum Opinion and Order.[60] In reaching the amounts specified in Appendix C, we have reviewed the damages calculations provided by both LiTel and the defendants and made adjustments to these calculations as explained in Appendix C. In addition, we accept the defendants' claims for offsets to the extent that the record shows that LiTel purchased access services from the defendants during the period in question at rates that produced earnings below the Commission's prescribed levels. We address LiTel's claims for interest on the damages amounts in the section below.[61]

2. Interest on Damages Awards

a. Contentions of the Parties

31. USWC claims that LiTel is not entitled to prejudgment interest should the Commission award damages to it. USWC contends that while the Commission may award interest under Section 204 of the Act, there is no provision for the award of interest under Section 206 of the Act.[62] Because we cannot lawfully grant the complainant refunds, USWC argues, we may not award interest.

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[52] *MCI Damages Order*, 8 FCC Rcd at 1527, para. 35.
[53] *See MCI Liability Order*, 5 FCC Rcd at 223.
[54] *Id.*
[55] *MCI Damages Order*, 8 FCC Rcd at 1526-27, para. 34.
[56] *Id.* at 1527, para. 35.
[57] *Id.* at para. 36.
[58] *Id.* at 1527-28, para. 39.
[59] *Id.* at 1528, para. 40.
[60] USWC argues that the "Commission is of the opinion that the ordering of damages in private disputes involving tariff rates is part of its public interest mandate." USWC Br. at 17. While it is not clear what USWC is arguing, we note that the Act clearly gives the Commission authority to adjudicate complaints and award damages where a complainant has successfully shown that a common carrier has violated the Act and the complainant has sustained damages as a result of that violation. *See* 47 U.S.C. §§ 206-208. Further, contrary to USWC's assertion, consideration of the public interest is not prohibited by Sections 206-208. USWC also claims that the Common Carrier Bureau (Bureau) is acting as both "judge and prosecutor" in these proceedings, which it claims further shows that the Commission is confusing its public policy functions with its adjudicatory functions. USWC Br. at 17. We have previously disagreed with USWC's characterization of the Bureau's activities in prior complaint proceedings and continue to do so. *See, e.g., MCI Damages Order*, 8 FCC Rcd 1517, 1518 at n.13. The Bureau has at all times been acting as a "decision maker" and not as a "prosecutor" as claimed by USWC. In addition, USWC asserts that our refusal to allow defendants to submit counterclaims, including compulsory counterclaims, further supports its contention that we do "not view our adjudicatory role" as truly adjudicatory. USWC Br. at 18. The Act neither allows for compulsory counterclaims nor provides carriers with a private cause of action against their customers.
[61] Because we conclude that CBT and NYT have successfully established offsets that negate LiTel's damages claims, we do not reach the issue of interest for CBT and NYT.
[62] USWC Br. at 9-10.

32. LiTel disputes USWC's claims that it is not entitled to prejudgment interest in connection with any ultimate award of damages. LiTel contends that an award of prejudgment interest is appropriate in the instant complaints because it is typically awarded in overcharge cases under the Act in order to make the injured party whole and has been awarded in similar complaint proceedings before the Commission.[63]

b. Discussion

33. USWC's claim that the Commission lacks authority to award interest in a Section 208 common carrier complaint proceeding has no merit. Although Section 208 of the Act does not explicitly authorize an award of interest, our authority under Section 4(i)[64] to award interest in a common carrier complaint case is well established.[65] In deciding whether to award interest in a particular common carrier complaint case we are generally guided by federal court practice, where the award of prejudgment interest "... is a matter left to the sound discretion of the trial court."[66] The award of interest in a common carrier complaint case is thus guided by considerations of fairness. Applying this standard, we are persuaded that an award of interest is appropriate in these cases. LiTel was effectively deprived of the use of the excessive amounts it paid USWC as a result of USWC's unlawful rates. USWC, on the other hand, enjoyed the beneficial use for a substantial period of time of funds to which LiTel rightfully has claims. We are persuaded that interest is required not only to effect a full and fair remedy for LiTel, which paid rates higher than it would have paid had USWC earned within the prescribed levels, but also to avoid any unjust enrichment of USWC stemming from its charging rates that we have determined to be unjust and unreasonable under Section 201(b) of the Act.[67] We conclude that interest, compounded daily, should be computed at the IRS rate for tax overpayments.[68] In addition, we find that interest should begin to accrue from January 1, 1991, the day after the 1989-1990 monitoring period ended, for damages awards based on overearnings for that period. Accordingly, we award interest calculated at the IRS rate for tax overpayments,[69] compounded daily, from USWC to LiTel from January 1, 1991 until the date of full payment to LiTel.

IV. CONCLUSION

34. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that LiTel is entitled to an award of damages, plus accumulated interest, compounded daily, on such damages, for USWC's violations of the Commission's rate of return prescription for the 1989-1990 monitoring period.

V. ORDERING CLAUSES

35. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act, as amended, 47 U.S.C. §§ 4(i), 4(j), 201, 206, 207, 208, and 209, that the above-captioned complaints filed by LiTel Telecommunications Corporation d/b/a LCI International ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

36. IT IS FURTHER ORDERED that the Motion to Dismiss filed on November 23, 1992 by Cincinnati Bell Telephone Company and the Motion to Dismiss filed on November 23, 1992 by New York Telephone Company ARE DENIED.

37. IT IS FURTHER ORDERED that the Motions to Supplement Record: Damages Calculation filed on August 6, 1993 by LiTel Telecommunications Corporation d/b/a LCI International ARE GRANTED.

38. IT IS FURTHER ORDERED that the Motions for Leave to File Reply to Defendant's Opposition to Motion to Supplement the Record filed on August 30, 1993 by LiTel Telecommunications Corporation d/b/a LCI International ARE GRANTED.

39. IT IS FURTHER ORDERED that the defendants identified in Appendix B to this Memorandum Opinion and Order SHALL PAY to the complainant the amount specified there within 60 days after the release date of this Memorandum Opinion and Order.

40. IT IS FURTHER ORDERED that the defendants identified in Appendix B SHALL PAY to the complainant interest, compounded daily, on the damages specified there computed at the IRS rates set forth in Appendix C from January 1, 1991 until the date full payment is made.

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[63] *See, e.g.*, LiTel Br., File No. 92-119, at 14-15; LiTel RBr., File No. 92-119, at 16-17.

[64] 47 U.S.C. § 154(i).

[65] *See* MCI Telecommunications Corp. v. American Tel. and Tel. Co., 94 FCC 2d 332, 343-46 (1983).

[66] *United States v. California Board of Equalization*, 650 F.2d 1127, 1132 (9th Cir. 1981), *aff'd*, 456 U.S. 901 (1982), *reh'g denied*, 456 U.S. 985 (1982).

[67] *See New England Tel. & Tel. Co. v. FCC*, 826 F.2d 1101, 1113 (D.C. Cir. 1987), *cert. denied*, 490 U.S. 1039 (1989) (carriers may reasonably be required "to pay full interest for earnings they had no right to retain in the first place.").

[68] We have adopted a general requirement that interest awarded in refund and reparation cases decided under the Act be computed on a daily compounded basis. We are persuaded that daily compounded interest more closely reflects economic reality and more adequately compensates aggrieved parties for the value of money owed. Daily compounded interest will, therefore, better achieve the Act's goal of compensating parties who were deprived of the use of excessive charges paid and preventing the unjust enrichment of carriers who utilized funds to which they had no rightful claim. Daily compounded interest will also help to eliminate incentives carriers might otherwise have to delay resolution of cases against them. *See* Competitive Telecommunications Ass'n v. The Chesapeake and Potomac Tel. Cos., 8 FCC Rcd 5550, 5553, at para. 15 (1993) and Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 5485, 5495 at para. 42 (1993).

[69] The applicable IRS rates are set forth in Appendix C.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

APPENDIX A

1989-1990 Rates of Return

Company	Inter-state	Common Line	Special Access	Switched Traffic Sensitive
Cincinnati Bell Tel. Co.	11.52	11.53	8.53	13.19
New York Tel. Co.	11.59	10.04	9.00	13.35
U S WEST Communications, Inc.	12.75	12.04	13.25	13.40

APPENDIX B

CINCINNATI BELL TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS [2]	DAMAGES AWARD
LiTel Telecommunications Corp. d/b/a LCI International File No. E-92-120	24,152	240,150 [3]	0

[1] The complainant in this proceeding has stipulated to the billing information provided by defendant for the purposes of calculating damages. We note that in using this billing information the parties have reached different results due to rounding-off differences. This results in slightly lower damages calculations by the complainant as compared to the calculation by the defendant. We accept the complainant's calculation, however, because this calculation represents its claim for damages in this proceeding.

[2] We accept defendant's calculations of offsets as undisputed by complainant.

[3] Defendant erroneously calculated its offsets as underearnings below 12.40%. We have recalculated the underearnings at 12%. To the extent a carrier achieves the target rate of return of 12%, it cannot be said to have underearned. Thus, defendant is entitled to offset $12,052 for common line category underearnings and $288,098 for special access category underearnings.

NEW YORK TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS [2]	DAMAGES AWARD
LiTel Telecommunications Corp. d/b/a LCI International File No. E-92-122	70,396	96,882	0

[1] The complainant in this proceeding has stipulated to the billing information provided by defendant for the purposes of calculating damages. We note that in using this billing information the parties have reached different results due to rounding-off differences. This results in slightly lower damages calculations by the complainant as compared to the calculation by the defendant. We accept the complainant's calculation, however, because this calculation represents its claim for damages in this proceeding.

[2] We accept defendant's calculation of offsets as undisputed by complainant.

U S WEST COMMUNICATIONS, INC.

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS	DAMAGES AWARD
LiTel Telecommunications Corp. d/b/a LCI International File No. E-92-119	54,311 [2]	0	54,311

[1] The complainant in this proceeding has stipulated to the billing information provided by defendant for the purposes of calculating damages. We note that in using this billing information the parties have reached different results due to rounding-off differences. This results in slightly lower damages calculations by the complainant as compared to the calculation by the defendant. We accept the complainant's calculation, however, because this calculation represents its claim for damages in this proceeding.

[2] The defendant contends that the complainant incorrectly calculated the applicable tax rate used in its calculation of damages. USWC made this assertion without providing what it contends to be the correct tax rate. We will accept the complainant's calculation.

APPENDIX C

Effective Period	Rate	Internal Revenue Service Citation
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12
01/01/93 - 03/31/93	6%	Rev.Rul. 92-110, 1992-52 I.R.B. 15
04/01/93 - 06/30/93	6%	Rev.Rul. 93-24, 1993-14 I.R.B. 5
07/01/93 - 09/30/93	6%	Rev.Rul. 93-40, 1993-23 I.R.B. 9
10/01/93 - 12/31/93	6%	Rev.Rul. 93-63, 1993-30 I.R.B. 40
01/01/94 - 03/31/94	6%	Rev.Rul. 93-94, 1993-42 I.R.B. 42
04/01/94 - 06/30/94	6%	Rev.Rul. 94-21, 1994-14 I.R.B. 14

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

WILTEL, INC.,
Complainant,

v. File No. E-93-132

GTE NORTH INCORPORATED,
Defendant.

ORDER

Adopted: March 16, 1994; Released: March 29, 1994

By the Chief, Formal Complaints & Investigations Branch, Enforcement Division, Common Carrier Bureau:

1. On September 29, 1993, WilTel, Inc. (WilTel) filed the above-captioned formal complaint against GTE North Incorporated (GTE) seeking damages resulting from GTE's alleged violations of the Commission's rate of return prescription for the period January 1, 1989 through December 31, 1990. On March 8, 1994, WilTel and GTE filed a joint motion to dismiss. In support of their motion, the parties state that they have settled all issues and controversies in this proceeding.

2. We are satisfied that dismissal of the complaint will serve the public interest by eliminating the need for further litigation and the expenditure of further time and resources by the Commission and the parties.

3. Accordingly, IT IS ORDERED, pursuant to Section 4(i) of the Communications Act of 1934, as amended, 47 U.S.C. § 154(i), and the authority delegated under Section 0.291 of the Commission's rules, 47 C.F.R. § 0.291, that the Joint Motion to Dismiss filed on March 8, 1994 IS GRANTED.

4. IT IS FURTHER ORDERED that the above-captioned complaint IS DISMISSED WITH PREJUDICE and the proceeding IS TERMINATED.

FEDERAL COMMUNICATIONS COMMISSION

Thomas D. Wyatt
Chief, Formal Complaints &
Investigations Branch
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Policy and Rules Concerning Rates for Dominate Carriers — AAD 93-154

US West Communications, Inc.

Petition for Waiver of Certain Reporting Requirements

MEMORANDUM OPINION AND ORDER

Adopted: March 23, 1994; Released: March 24, 1994

By the Chief, Accounting and Audits Division:

1. On October 12, 1993, the Bureau released its Memorandum Opinion and Order[1] in the above-captioned proceeding to establish in detail the service quality and infrastructure reporting requirements that the Commission had determined were necessary in initiating price cap regulation for local exchange carriers (LECs).[2] The *Service Quality Order* established filing dates for each of the reports required from price cap LECs. One of these reports, the Quarterly Service Quality Report (ARMIS Report 43-05) for the fourth quarter 1993, is due March 31, 1994. On November 12, 1993, US West Communications, Inc. (US West) filed a petition for waiver of some of the filing requirements for the fourth quarter calendar year 1993. In this Order we grant that petition for US West's filing for the fourth quarter of 1993.

2. US West states that the Bureau now requires carriers to report installation intervals (Table I - Installation & Repair Intervals (Interexchange Access)) Line 114 - Average Interval and (Table II - Installation & Repair Intervals (Local Service)) Line 134 - Average Interval, in actual business days as part of the Quarterly Service Quality Report 43-05.[3] US West states that, at the end of each reporting period, orders will have been placed but not completed during the same reporting period. These orders are completed generally during the following period. US West, also states that, under the Bureau's definition, it is not be able to complete properly the tables because sufficient information is not available for orders placed during the reporting period. US West requests a waiver to allow it to report data concerning service and orders completed rather than placed during the reporting time period in Rows 114 and 134.

3. US West also states that the Bureau allows LECs the option of using either orders or circuits in completing Table I of the Quarterly Service Quality Report 43-05.[4] US West states that it currently reports these data by circuits, rather than by orders, as allowed by the *Order*.[5] Further, US West states that as a result of the systems US West utilizes to gather its circuit information it is unable to exclude commitment dates set by customers. To make such data available would require significant programming, methods and systems changes. The changes could not be made in the short term. Therefore, US West requests a waiver from the requirement that Row 114 data exclude orders having commitment dates set by the customers as long as US West uses circuit information to complete Row 114 of Table I.

4. We find that US West has shown adequate cause to grant its waiver request for US West's fourth quarter, 1993 filing.

5. ACCORDINGLY, IT IS ORDERED that the request for waiver filed on November 12, 1993 by US West Communications, Inc. in the above captioned proceeding, IS GRANTED for the fourth quarter, 1993 filing.

FEDERAL COMMUNICATIONS COMMISSION

Kenneth P. Moran
Chief
Accounting and Audits Division
Common Carrier Bureau

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[1] Policy and Rules concerning Rates for Dominant Carriers, CC Docket No. 93-1138, Memorandum Opinion and Order, 8 FCC Rcd 7474 (Com. Car. Bur. 1993) (*Service Quality Order*).

[2] Second Report and Order, 5 FCC Rcd 6786 (1990) and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.* 6 FCC Rcd 2637 (1991), *petitions for further recon. pending, appeal docketed sub nom. D.C. PSC v. FCC*, No. 91-1279 (D.C. Cir. June 14, 1991).

[3] *See* Policy and Rules concerning Rates for Dominant Carriers, CC Docket No. 93-1138, Memorandum Opinion and Order, 8 FCC Rcd 7474 (Com. Car. Bur. 1993) at ¶ ¶ 18, 20.

[4] *See id.* ¶ 18.

[5] US West currently reports by circuits, as do the majority of the price cap LECs. If US West were to convert to an "order" basis of reporting, the Bureau would not be able to see results that are measured on a comparable basis. Although US West could convert to an "order" basis of reporting, US West states that significant modifications would still be necessary to exclude orders with customer-negotiated due dates.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Fortune News Industrial Limited
Kowloon, Hong King

NAL/Acct. No.: 415HF0001

Liability for Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: March 23, 1994; Released: March 23, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended, (Act), 47 U.S.C. § 503(b) and Sections 1.80 and 2.946 of the Commission's Rules, 47 C.F.R. §§ 1.80, 2.946, to Fortune News Industrial Limited (Fortune) for violation of Section 2.936(a) of the Commission's Rules, 47 C.F.R. § 2.936(a), by failing to provide a test sample of equipment marketed under FCC Identifier IQ2K-62001A as requested.

2. The appropriate amount for this forfeiture is $4,000.

II. BACKGROUND

3. On March 25, 1993, and again on May 27, 1993, the Authorization and Evaluation Division of the Commission's Office of Engineering and Technology (OET) requested Fortune to ship one sample of the land mobile transmitter authorized to be marketed under Equipment Authorization Identifier IQ2K-62001A to the Commission's Labratory in Columbia, Maryland, for inspection.

4. On June 15, 1993, OET received a response from Fortune to the March 25, 1993, letter advising that it had no units which it could make available. Fortune promised to provide a sample from a scheduled July 28, 1993, production run. On June 23, 1993, OET replied advising that it would accept shipment of the requested sample at the end of July, 1993. To date, no sample has been received.

III. DISCUSSION

5. Each grant of an equipment authorization is conditioned upon the grantee providing to the Commission, on request, a sample or samples for inspection of the equipment for which the authorization is granted. *See* Sections 2.936(a) and 2.945 of the Commission's Rules. 47 C.F.R. §§ 2.936(a) and 2.945.

6. The grantee responded to the March 25, 1993, letter requesting submission of a sample for inspection and asked for an extension of time in which to submit the requested sample. It failed to submit the sample. It also failed to respond to the May 27, and June 23, 1993, communications again requesting samples of the equipment.

7. Section 2.946(a) of the Commission's Rules provides for a forfeiture penalty for failure to comply with a request for submission of equipment for inspection. 47 C.F.R. § 2.946(a). The Commission's *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993) specifies that the base forfeiture amount for failure to reply to Commission communications is $4,000. In determining the appropriate amount of the liability, the factors set forth in Section 503(b)(2)(D) of the Act and the above *Policy Statement* were considered. No further adjustments appear warranted.

IV. ORDERING CLAUSES

8. Accordingly, IT IS ORDERED, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, that Fortune News Industrial Limited IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of four thousand dollars ($4,000) for violation of Section 2.936(a) of the Commission's Rules by failing to respond to Commission correspondence and failing to provide a sample of a type accepted transmitter for inspection.

9. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that Fortune News Industrial Limited shall, within thirty (30) days of the release of this Notice, pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any written response must include a detailed factual statement and supporting documentation.[1] Forfeitures shall be paid by check or similar instrument drawn on a United States bank and made payable to the Federal Communications Commission. The remittance should be marked "NAL/Acct. No. 415HF0036" and mailed to:

Federal Communications Commission
P.O. Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that the Field Operations Bureau send by airmail one copy of this Notice to Fortune News Industrial Limited, Rm. 204, 2/F, Century Centre, 44 Hung To Road, Kwun Tong, Kowloon, Hong Kong.

[1] Claims of inability to pay should be supported by federal tax returns or other audited financial statements for the most recent three years.

FEDERAL COMMUNICATIONS COMMISSION

Lauren J. Belvin
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 90-571

In the Matter of

Telecommunications Relay Services,
and the Americans with Disabilities
Act of 1990

SECOND ORDER ON RECONSIDERATION AND FOURTH REPORT AND ORDER

Adopted: September 28, 1993; Released: September 29, 1993

By the Commission:

I. INTRODUCTION

1. On August 4, 1993, pursuant to Section 64.604 (c)(4)(iii) of the Commission's Rules, 47, C.F.R. 64.604, the Telecommunications Relay Services (TRS) Interim Fund Administrator, the National Exchange Carrier Association, Inc. (NECA) filed its proposed payment formula, fund size, and payment schedule for purposes of administering the interstate TRS Fund.[1] This Order approves the payment formula, fund size, and payment schedule for the TRS Fund.

2. Further, we have before us petitions for reconsideration, and a request for stay of policies and rules we recently adopted concerning the TRS Fund.[2] For the reasons set forth below, we take the following actions: (1) We reaffirm that interstate service, for purposes of TRS funding includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS),[3] access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. (2) We clarify that TRS Fund contributions may be treated as exogenous costs under price cap regulation. (3) We reiterate that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and that a Joint Board proceeding at this time is unnecessary. (4) We clarify that the administrator shall reimburse committee members for the reasonable costs incurred in attending advisory committee meetings. (5) We dismiss the request for stay filed by IDB.

II. BACKGROUND

3. The Americans with Disabilities Act of 1990 (ADA) requires that the Commission ensure that interstate and intrastate telecommunications relay services[4] are available, to the extent possible and in the most efficient manner to individuals in the United States with hearing and speech disabilities by July 26, 1993. In order to fulfill this mandate, the Commission, on November 8, 1990, initiated a rulemaking proceeding.[5] After considering extensive public comment, and the specific requirements of Title IV of the ADA,[6] the Commission adopted a Report and Order (*TRS Order*).[7] In the *TRS Order*, the Commission fashioned a comprehensive set of rules which set forth terminology and definitions of TRS, prescribed operational, technical, and functional minimum standards required of all TRS providers, and delineated the state certification process. On February 19, 1993, in an Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking (*TRS II*),[8] the Commission resolved five petitions for reconsideration, adopted a shared-funding mechanism for interstate TRS cost recovery, and proposed a specific plan establishing a TRS interstate cost recovery fund. On July 20, 1993, the Commission adopted a Third Report and Order (*TRS III*) which adopted rules implementing the TRS Fund.[9]

III. DISCUSSION

A. TRS Fund Rates and Schedules

4. *Comments.* Section 64.605(e) of the Commission's rules requires the TRS Fund administrator to file with the Commission schedules of payment formulas that are designed to compensate TRS providers for reasonable costs of providing interstate TRS. Pursuant to Section 64.605(e),

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[1] *See* Public Notice, No. 34406 (August 11, 1993).

[2] *See* Telecommunications Relay Services, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Third Report and Order, 58 Fed. Reg. 39671 (July 26, 1993); 8 FCC Rcd 5300 (1993). (hereinafter *TRS III*). Appendix A lists the parties filing comments and reply comments, petitions for reconsideration or stay, as well as abbreviations used throughout this Order to refer to those parties.

[3] We note that on September 23, 1993, the Commission initiated a rulemaking proceeding to address to what extent PCS should be considered a private or common carrier service. *See* Implementation of Title VI of the Omnibus Budget Reconciliation Act of 1993, Notice of Proposed Rulemaking (regulatory treatment of mobile services, including personal communications services, under revised Section 332 of the Communications Act).

[4] Telecommunications relay service (TRS) permits persons with and without hearing and speech disabilities to communicate using the telephone. TRS facilities are equipped with specialized equipment and staffed by communications assistants (CAs) who relay conversation between people who use text telephones and people who use traditional telephones.

[5] *See* Notice of Proposed Rulemaking, CC Docket No. 90-571, 55 Fed. Reg. 50037 (Dec. 4, 1990); 5 FCC Rcd 7187 (1990).

[6] *See* S.933, Pub. L. 101-336, 104 Stat. 327, 366-69 (July 26, 1990).

[7] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, CC Docket No. 90-571, Report and Order and Request for Comments, 6 FCC Rcd 4657 (1991) (*TRS Order*).

[8] Telecommunications Services for Individuals with Hearing and Speech Disabilities, and the Americans with Disabilities Act of 1990, Order on Reconsideration, Second Report and Order, and Further Notice of Proposed Rulemaking, 8 FCC Rcd 1802 (February 25, 1993), (hereinafter *TRS II*).

[9] *TRS III*, *supra*, n.2.

NECA filed a proposed payment formula, fund size and payment schedule for purposes of administering the interstate TRS Fund.

5. In its filing, NECA proposes that the Commission approve the rate of $1.705 as the average payment per interstate minute of use. NECA projects, based on applying the nationwide average rate to total estimated interstate annual demand, that nationwide interstate annual costs for 1993 will be between $24 million and $29 million. Further, NECA states that administrative expenses are estimated to be approximately $312,000 annually, plus start-up costs of approximately $567,000, that uncollectibles are estimated at 3% annually, and that all NECA expenses associated with TRS will be accounted for on a "keep-cost" basis and charged only to the TRS Fund.[10] NECA projects the TRS Fund size, including growth in TRS expenses and demand, NECA TRS administrative expenses and an additive for uncollectibles, to be between $25 million and $31 million. NECA further proposes that the payment formula set forth in its filing is to remain in effect through December 31, 1994, and that in succeeding years, NECA will file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Finally, NECA proposes that eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period from July 26, 1993, through August 31, 1993. In its filing, NECA proposes that TRS providers be required to report to NECA actual interstate minutes of use for this period no later than September 14, 1993, and thereafter, providers report usage for each monthly service period by the tenth work day of the succeeding month.[11] The payment formula, rate, and fund size proposals of NECA are virtually unchanged from estimates considered in *TRS III*, and are unopposed.

6. In its comments, AT&T, the sole commenter on the NECA filing, proposes three technical modifications to NECA's reporting schedule proposal and general administration of the TRS Fund. Specifically, AT&T's proposes (1) that NECA's proposal be modified to provide for adjustments of the payment amount at six month intervals during the initial period of TRS Fund operation through December, 1994; (2) that NECA should be required to invest contributions in interest bearing securities and that fund contributors be credited with the interest earned on their fund payments as an offset to any future payment obligations; and (3) that NECA's proposed reporting schedule be modified to permit TRS providers to compile information from their normal records systems.[12] AT&T asserts that this reporting schedule modification should not affect the schedule proposed by NECA for disbursements to TRS providers.

7. In its reply comments, NECA concurs that the TRS Fund's performance requires close scrutiny and may require revision. However, NECA asserts that a scheduled revision of the payment formula would require a completely new "cost and demand data" collection from TRS providers, and that, absent clear evidence that TRS providers were not being compensated adequately at the payment level approved by the Commission for that calendar year, NECA would not recommend mandating a burdensome data collection to recalculate the formula. With regard to investment and earnings of TRS fund contributions, NECA agrees that undistributed contributions must be wisely invested and intends to invest undistributed contributions in secure interest-bearing securities. NECA states that interest on investments of any excess contributions will be used to reduce future TRS Fund requirements. With regard to the reporting schedule, NECA proposes to revise its proposed schedule to require that TRS demand be reported no later than the fifteenth work day of the month succeeding the associated service period, and will distribute a revised schedule to TRS providers to reflect this modification, if approved by the Commission.

8. *Decision.* We have reviewed the TRS Fund size, rate and payment schedule proposed by NECA and the comments of AT&T regarding administrative matters and reporting schedules. Pursuant to Section 64.604(c)(4)(iii) of the Commission's rules, we approve the proposed rate of $1.705 as the rate of payment to TRS providers per interstate minute of use. This rate will remain in effect through December 31, 1994. For succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission on October 1, to be effective for a one-year period beginning the following January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

9. With regard to the reporting and payment schedule, we find merit in AT&T's proposed revision, and recognize that NECA has found administrative reasons to revise its reporting schedule to reflect TRS providers report actual interstate minutes of use for each monthly service period by the fifteenth work day of the succeeding month.[13] We recognize that September 15, 1993 has passed and, therefore, require that for the service period from July 26, 1993, through August 31, 1993, TRS providers report usage to NECA no later than October 1, 1993, if they wish to be reimbursed by November 1, 1993. We note, however, that TRS providers can report usage for this period until October 28, 1993, in order to be reimbursed by December 1, 1993.

B. Petitions for Reconsideration

10. *Petitions.* In their petitions for reconsideration of *TRS III*, Ameritech, NYNEX, and SWB request that the Commission reconsider the definition of gross revenues and exclude revenues received by local exchange carriers (LECs) for the provision of interstate access service, which is the basis for TRS contributions. Specifically, Ameritech contends that requiring LECs to contribute on the basis of access service revenues, including subscriber line charges (SLCs), creates inefficiency and unnecessary administrative costs because it results in double billing for those costs. In the alternative, Ameritech requests that the Commission state that TRS costs will receive exogenous cost treatment

[10] NECA Filing at 9.
[11] *See* NECA filing at Exhibit 3.8
[12] *See* AT&T Comments, Exhibit A.
[13] The modifications proposed by AT&T regarding interim changes in the payment formula and general administration of the TRS Fund were fully considered and resolved in *TRS III* at paragraphs 21 and 22.

under price cap regulation because TRS costs were imposed by the legislative requirement of the ADA and therefore, are beyond the control of carriers. Ameritech notes that these TRS costs are imposed on common carriers providing interstate services and therefore uniquely affect LECs.[14] In its petition, NYNEX asserts that double billing results in unnecessary transaction costs including the costs of LECs gathering data and preparing the TRS Fund Worksheet, submission and processing by NECA, applying for exogenous cost treatment, and recovery from IXCs.

11. In its petition, CompTel proposes that the Commission exclude payments made by carriers to other common carriers for interstate transmission service and for interstate access, because to do otherwise, it contends, would lead to double payment by many carriers, particularly resale carriers. In its petition, Telocator contends that paging carriers should not be required to contribute to the TRS Fund because paging service does not constitute telephone voice transmission service and paging carriers do not have to provide interstate TRS.[15]

12. In its petition, NARUC requests that the Commission reconsider its decision not to refer the separations issues raised in the TRS Fund proceeding to a Joint Board. NARUC asserts that a Joint Board proceeding is necessary to assure fair cost allocation between the interstate and intrastate jurisdictions. Further, NARUC requests that the Commission clarify that the costs of participation incurred by members of the TRS advisory committee be covered by the TRS Fund administrator, and that the Commission clarify that "state representatives" are representatives of state public utility commissions.

13. In its petition for reconsideration,[16] IDB requests that the Commission reconsider the inclusion of video and audio program distribution services in the definition of gross revenues for purposes of TRS contributions.[17] Specifically, IDB argues that inclusion of revenues from video and audio program distribution services is arbitrary and capricious because it is not supported by Section 225(d)(b)(B), and that the Commission failed to provide adequate notice of its intent to include these services in the TRS contribution base.[18]

14. In its opposition, USTA asserts that the Commission was neither arbitrary nor capricious in its decision to include all interstate services, including audio and video, in the interstate contribution requirement of the TRS Fund. In support of its assertion, USTA argues that the explicit language of the statute requires that costs caused by interstate TRS be recovered from all subscribers for every interstate service.[19] USTA contends that the term "interstate service" is intended to be broad and comprehensive and is not ambiguous. Further, USTA asserts that all interested parties had ample notice and opportunity for comment in the Commission's February 25, 1993, further notice (*TRS II*) seeking comment on a proposed shared-funding mechanism for interstate TRS cost recovery. USTA argues that to the extent IDB chose not to participate in *TRS II*, it should not be allowed to litigate the same issue in a petition for stay.

15. *Decision.* As stated in *TRS III*, in order to provide universal telephone service to TRS users as mandated by the ADA, Congress ordered the Commission to prescribe regulations providing generally that costs caused by interstate telecommunications relay services should be recovered from all subscribers to every interstate service.[20] We believe that recovering interstate relay costs from all common carriers who provide interstate service on the basis of their interstate revenues will accomplish this goal. In *TRS III*, we defined, for the purposes of funding interstate TRS, that interstate service includes, but is not limited to, the interstate portion of: cellular telephone and paging, mobile radio, operator services, personal communications service (PCS), access (including subscriber line charges), alternative access and special access, packet-switched, WATS, 800, 900, message telephone (MTS), private line, telex, telegraph, video, satellite, international, intraLATA, and resale services, provided by common carriers. Some petitioners assert that it is inappropriate to require contributions from providers of resale services and access services. Petitioners argue that double payment would occur if both resold and underlying services are subject to contribution. These petitioners assert that double payment results because the charge for the resold service would presumably cover the contribution for the resold service as well for the underlying services. Petitioners' assertions regarding access, resale, and paging were considered at length in *TRS III*.[21] Petitioners now contend that requiring contributions based on these interstate services creates inefficiencies and administrative costs.

16. The petitioners have not presented any arguments that would undermine our previous conclusion that Congress intended that subscribers to "every" interstate service, including access and other resold services, be required to contribute to the support of telecommunications relay services. The clear language of the statute is broad and all-inclusive: "costs caused by interstate telecommunications relay services shall be recovered from all subscribers for every interstate service. . ." 47 U.S.C. Section 225(d)(3). Congress gave no indication that any individual interstate service should be exempt from this requirement. Indeed, it would be nearly impossible to adopt the petitioners' approach to implementing the statute's cost recovery provisions. Under their interpretation, the Commission would continually be called upon to make decisions about whether a particular interstate service was composed of any underlying service that may have already made some contribution to the TRS Fund. We would also be required to decide whether it should be the underlying service or the resold service that should be required to contribute, and we would have to determine what portion of each service was not resold. As we move to a network of networks, such line-drawing would be next to impossible. More impor-

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[14] *See* Ameritech petition at 3.
[15] Petition of Telocator at 2.
[16] IDB filed a petition for stay pending reconsideration. In light of our consideration of IDB's reconsideration petition here, we dismiss the stay request because it is moot.
[17] IDB does not request a stay of the requirement to contribute based on its revenue from interstate telephone services.
[18] Petition for Stay at 2.
[19] Opposition of USTA at 2.
[20] *See TRS III* at paragraph 12.
[21] *Id.* at paragraphs 9-16.

tantly, it would be inconsistent with the broad purpose of the statute, which is to require contributions from *all* subscribers to *every* interstate service.

17. We also disagree with Telocator's argument that interstate paging services should be exempt from the contribution requirement because paging services are not voice services subject to the "provision of services" requirement set forth in Section 225(c) of the Act.[22] The Act clearly distinguishes between the obligation to provide TRS service, which applies only to "telephone voice transmission services," and the obligation to contribute to the cost recovery for those services, which applies to "all subscribers for every interstate service" without limitation. 47 U.S.C. Sections 225(c), 225(d)(3). Nothing in the ADA's legislative history would suggest that Congress meant to apply its cost recovery provisions to subscribers of interstate voice services only.

18. We are persuaded by petitioners to clarify that for TRS fund contributors regulated under price cap regulation, contributions may be treated as exogenous costs for the purposes of calculating the price cap index. We make this finding pursuant to Section 61.45(d) of the Commission's rules, which grants exogenous treatment to any cost the Commission shall permit or require, plus a list of specifically enumerated exogenous costs.[23] As the Commission recently stated, exogenous costs are selected based upon whether the cost is beyond the carrier's control and not otherwise reflected in the price cap formula, *i.e.*, in the measure of inflation less productivity growth.[24] In the case of TRS fund contributions, carriers make a persuasive showing that these amounts are beyond their control. First, contributions are a requirement of the ADA as implemented by this Commission. Second, carriers are unable to control the actual level of these costs because fund contributions are made as a straight percentage of gross interstate revenues, a percentage amount imposed pursuant to this docket. While gross revenues is a statistic that reflects a number of business decisions over which the carrier has control, the percentage figure that determines their contribution is a regulatory decision, similar to the levy of a tax. Fund contributions are also not likely to otherwise be reflected in the price cap formula because, while all businesses must comply with other titles of the ADA, fund contributions are unique to common carriers and are in addition to the other obligations imposed on all businesses by the ADA.[25] Moreover, rate recognition of TRS fund contributions ensures that interstate ratepayers participate in the fund, as Congress intended. Finally, grant of exogenous cost treatment is consistent with the overall price cap incentive structure in that only the fund contribution amounts outside of carrier control are exogenous, not costs associated with the carrier's own decisions about how to configure service arrangements for TRS.

19. With regard to the petition of NARUC, we reiterate our findings in *TRS III* that existing accounting and separations rules should be adequate to deal with the provision of interstate TRS by subject service providers and, therefore, a Joint Board proceeding at this time is unnecessary.[26] Section 410(c) of the Communications Act of 1934, as amended, requires the Commission to refer to a Joint Board any proceeding regarding the jurisdictional separation of common carrier property and expenses between intrastate and interstate operations, which the Commission institutes pursuant to a notice of proposed rulemaking. We are not proposing any changes to the existing separations rules for subject carriers, and are requiring NECA's cost recovery form to be consistent with Parts 32 and 36 of our rules. With regard to NARUC's request for clarification of the composition of the advisory committee, we stated clearly that the committee was to include state regulatory officials. *See TRS III* at n. 30. Lastly, we do not oppose the proposal of NARUC that we clarify that the administrator of the TRS Fund may reimburse advisory committee members for the reasonable costs incurred in attending advisory committee meetings because doing so may permit some groups to participate who may not otherwise be able to do so. We expect the administrator to limit reimbursement to two persons per representative group,[27] be based upon requests by participants for reimbursement, and result in *de minimis* reimbursement costs. The administrator is required to report these costs pursuant to section 64.604(c)(4)(iii)(h) of the rules.

20. We also reject IDB's assertion that video and audio program distribution services by satellite or otherwise, should be excluded from the TRS revenue base. In *TRS III*, we concluded, after a thorough review of the legislative history, that private networks provided by common carriers are included in the cost recovery process, and as stated above, the statute requires that costs be recovered from subscribers of every interstate service and does not, for purposes of cost recovery, limit recovery to subscribers of telephone or other voice services. In response to IDB's Administrative Procedures Act[28] notice argument, we have solicited comments throughout this TRS proceeding on, *inter alia*, provision of service requirements, cost recovery, mandatory minimum TRS standards, and state certification procedures. With respect to defining subject carriers, we did not in any way limit our discussion to voice services. On the contrary, in the NPRM portion of *TRS II*, at Appendix D, the proposed rules stated that the contribu-

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[22] We note that although paging itself is not a voice service, some persons will use TRS centers to initiate pages.

[23] *See, e.g.*, Provision of Access for 800 Service, CC Docket No. 86-10, 8 FCC Rcd 907 (1993) (granting exogenous treatment of costs associated with the implementation of basic 800 data base service based on "highly unusual circumstances" surrounding the Commission's implementation of 800 data base).

[24] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employer's Accounting for Postretirement Benefits Other than Pensions," 8 FCC Rcd 1024 (1993).

[25] TRS Fund contributions are analogous to taxes levied solely on telecommunications providers, which we have held to be exogenous.

[26] Pursuant to Sections 36.2(e) and 36.376 of the Commission's rules, the contributions for interstate TRS, as well as any similar billed amounts that might be incurred solely for intrastate TRS, are to be categorized as "All Other Customer Services Expense," Category 3, and are to be directly assigned to the appropriate jurisdiction.

[27] Pursuant to Section 64.604(c)(4)(iii)(h) of the rule, the advisory committee includes representatives from the hearing and speech disabled community, voice TRS users, text telephone TRS users, interstate service providers, state regulatory officials, and TRS providers.

[28] 5 U.S.C. Section 553.

tion would be "assessed on all carriers that offer interstate telecommunications services."[29] We concur with USTA that IDB has had notice of cost recovery issues and ample opportunity to comment.

IV. CONCLUSION

21. For the reasons set forth above, we conclude that the TRS Fund payment formula, fund size, and payment schedule will create strong incentives for TRS providers to offer high quality, innovative services at reasonable cost. Moreover, providers of TRS will be reasonably compensated by all subscribers of every interstate service. We further conclude that the TRS Fund will further the goal of the ADA to provide functionally equivalent telecommunications services for all Americans.

V. ORDERING CLAUSES

22. Accordingly, IT IS ORDERED, pursuant to Section 225 of the Communications Act, 47 U.S.C. §§ 225, that $1.705 is the rate of payment to TRS providers per interstate minute of use, that it will remain in effect through December 31, 1994, and that in succeeding years, the fund administrator is required to file its TRS payment formulas, and associated data with the Commission by October 1, to be effective for a one-year period beginning each January 1, as prescribed in Section 64.604(c)(4)(iii)(h) of the rules. Eligible TRS providers shall begin receiving disbursements from the TRS Fund on or about November 1, 1993, and initial payments will cover the service period July 26, 1993, through August 31, 1993.

23. IT IS FURTHER ORDERED, that the petitions filed by Ameritech Operating Companies, NYNEX, National Association of Regulatory Utility Commissioners, Southwestern Bell Corporation, Competitive Telecommunications Association, Telocator, and IDB Communications Group, Inc. ARE GRANTED in part as discussed in this Order and ARE OTHERWISE DENIED.

24. IT IS FURTHER ORDERED, that the petition for stay filed by IDB Communications Group, Inc. IS DISMISSED.

25. IT IS FURTHER ORDERED, that this proceeding is terminated.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Attachment A

LIST OF COMMENTERS

TRS Fund Administration

AT&T

National Exchange Carriers Associations, Inc. (NECA) *

Petitions for Reconsideration of the Third Report and Order

Ameritech

Competitive Telecommunications Association

(CompTel)

IDB Communications (IDB)

National Association of Regulatory Utility Commissioners (NARUC)

NYNEX

Southwestern Bell Corporation (SWB)

Telocator

Petition for Stay

IDB Communications (IDB)

United States Telephone Association (USTA) (Opposition to Stay)

* Filed Reply Comments

[29] *See* Proposed Section 64.604(c)(4)(iii)(a).

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-37

In re Applications of

LEHIGH VALLEY COMMUNITY BROADCASTERS ASSOCIATION, INC. Channel 207A Allentown, Pennsylvania	File No. BPED-891019MF
BEACON BROADCASTING CORPORATION Channel 207A Allentown, Pennsylvania	File No. BPED-900905ML

For Construction Permit
for New Noncommercial
Educational FM Station

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1994; Released: March 30, 1994

By the Review Board: BLUMENTHAL and GREENE; Board Chairman MARINO issuing Separate Statement.

1. This matter was "informally" referred to the Review Board by the Audio Services Division, Mass Media Bureau, on February 7, 1994. Capital Cities/ABC, Inc., licensee of WPVI-TV, Channel 6, Philadelphia, Pennsylvania (hereinafter "Petitioner" or "WPVI"), in a pleading styled a "Petition for Reconsideration," asked the Bureau, on September 23, 1993, to overturn the grant of the Construction Permit made to Lehigh Valley Community Broadcasters Association, Inc. in the above-captioned proceeding. Petitioner keyed its filing to FCC *Report No.* 21710, at 9 (Aug. 31, 1993), which, it alleged, was the first public notice of the grant of Lehigh's proposal to operate on noncommercial Channel 201. An opposition, and supplement thereto, were filed by Lehigh on October 4 and 5, 1993; petitioner replied on October 14, 1993.

BACKGROUND

2. Petitioner has asserted to the Bureau that Lehigh's original application was mutually exclusive with that of Beacon Broadcasting Corp., but that Lehigh later amended to eliminate such exclusivity by specifying operation on channel 201 instead of channel 207A. The ALJ, argues petitioner, granted Lehigh's amended proposal without affording it notice or an opportunity to demonstrate that Lehigh's proposal would create objectionable interference to WPVI's signal reception to over 200,000 people. *See Memorandum Opinion and Order,* FCC 93M-312, released May 28, 1993 (ALJ). It further contends that, on August 24, 1993, the Bureau issued the subject Construction Permit to Lehigh. *See* FCC *Report No.* 21710 (Aug. 31, 1993). Because, it states, Section 316 of the Communications Act, 47 U.S.C. §316, prevents any order "modifying" a station license from becoming final until "the holder of the license" has had written notice and a reasonable opportunity to protest, petitioner contends the Bureau should grant reconsideration, vacate its action issuing the Lehigh Construction Permit, and deny Lehigh's application.

DISCUSSION

3. The Board lacks jurisdiction to act on the merits of WPVI's Petition. The gravamen of its complaint is that the Bureau improperly issued the Construction Permit to Lehigh without providing it with an opportunity to protest this action in derogation of its rights under 47 U.S.C. §316. The Board, however, has no prescribed authority to review the Bureau's permit issuance, inasmuch as our delegation is expressly limited to review of initial decisions, appeals from other adjudicative rulings of the ALJs, and action on pleadings filed in cases that are before the Board. 47 CFR §0.361-0.365. Moreover, the plain language of 47 CFR §1.106 (a)(1), which governs the filing of petitions for reconsideration, indicates clearly that the Board is not the appropriate forum for relief here. That language states:

> Petitions requesting reconsideration of a final Commission action will be acted on by the Commission. Petitions requesting reconsideration of a final decision of the Review Board will be acted on by the Board or certified to the Commission.... *Petitions requesting reconsideration of other final actions taken pursuant to delegated authority will be acted on by the designated authority or referred by such authority to the Commission.* [Emphasis added.]

Inasmuch as WPVI ties its Petition to what it deems to be a "final" Bureau action, any *reconsideration* must come from that same source.[1]

4. Furthermore, as WPVI notes, the ALJ has already granted Lehigh's application and terminated this proceeding. He did so after approving a settlement agreement between Lehigh and Beacon which called for removal of the mutual exclusivity between the applicants by Lehigh's channel amendment. *See supra,* FCC 93M-312. Insofar as WPVI seeks to challenge that ruling, Section 1.302(a) of

[1] We express no opinion as to whether grant of Lehigh's permit to operate on Channel 201 would constitute a "modification" of WPVI's license within the meaning of Section 316, but do note that the underlying dispute involves engineering questions and that the Board looks in the first instance to the Bureau's technical expertise when analyzing pertinent issues. *See, e.g., Texas Educational Broadcasting Co-Operative, Inc.,* 8 FCC Rcd 5104, 5105 (Rev. Bd. 1993)(settlement conditioned on Bureau approval of engineering amendment).

the Commission's rules, 47 CFR §1.302(a), affords thirty days to appeal to the Board an ALJ's ruling terminating a hearing proceeding.[2] The instant petition was filed some three months after release of the ALJ's ruling, and well after the ALJ's ruling became "effective." *See* 47 CFR §1.302(b).

5. Where the Board lacks jurisdiction to act in a given case, the Board is instructed to direct the matter to the appropriate Commission official. *See CSJ Investments, Inc.*, 5 FCC Rcd 7653 (1990); *Sam Widge Advertising Limited Partnership*, 6 FCC Rcd 5290 (Rev. Bd. 1991.) As indicated, the Mass Media Bureau seems the appropriate forum for any potential *reconsideration* relief.[3]

6. ACCORDINGLY, IT IS ORDERED, That the Petition for Reconsideration, filed September 23, 1993, by Capital Cities/ABC, Inc., IS REFERRED to the Chief, Mass Media Bureau for appropriate action.

FEDERAL COMMUNICATIONS COMMISSION

Norman B. Blumenthal
Member, Review Board

SEPARATE STATEMENT OF BOARD CHAIRMAN

In accordance with past instructions from the Commission, *see* para. 5 above, this case should be referred directly to the adjudication which resulted in the ALJ's *Order*, FCC 93M-312, and that *Order* is at the heart of petitioner's complaint. As a party to that adjudication, the Bureau has no authority to review or vacate the ALJ's Order. *See* 47 USC 409(c)(1). Since the Board has lost jurisdiction because of the passage of time, only the Commission has jurisdiction over this adjudicatory case.

[2] Moreover, 47 CFR § 1.302(a) provides that only a "party to the proceeding" may file an appeal, and WPVI has not asserted that it is a party or has sought to intervene to attain party status. *See* 47 CFR § 1.223. Because we lack basic jurisdiction, we need not speculate over whether, under the alleged circumstances, discretionary intervention might have been considered. 8

[3] As indicated earlier, the Chief, Mass Media Bureau may choose, pursuant to 47 CFR §1.106(a), to certify the petition to the full Commission, which has jurisdiction over the actions of all its subordinate officials, including the Bureau and the ALJ.

Before the
Federal Communications Commission
Washington, D.C. 20554

Gen. Docket No. 90-119

In the Matter of

Florida Public Safety Plan

ORDER

Adopted: March 23, 1994; Released: March 30, 1994

By the Deputy Chief, Land Mobile and Microwave Division and the Acting Chief, Spectrum Engineering Division:

1. The Private Radio Bureau and the Office of Engineering and Technology, acting under delegated authority, accepted the Florida (Region 9) Public Safety Plan (Plan) on May 10, 1990, 5 FCC Rcd 3067 (1990).

2. By letter dated January 13, 1994, the Region proposed to amend its Plan. The proposed amendment would, in part, add an additional subregion, clarify timeframes for applications for pooled and dedicated channel allotments, clarify channel loading requirements, and clarify and enlarge upon mutual aid requirements. The Commission placed the letter on Public Notice for comments due on March 4, 1994, 58 FR 5429 (February 4, 1994), and received no comments.

3. We have reviewed the proposed amendment to the Region 9 Plan and, having received no comments to the contrary, conclude it furthers the interests of the eligible entities within the Region.

4. Accordingly, IT IS ORDERED, That the Public Safety Radio Plan for Florida (Region 9) IS AMENDED, as set forth in the Region's letter of January 13, 1994. This Amendment is effective immediately.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs
Deputy Chief, Land Mobile and
Microwave Division

Lawrence P. Petak
Acting Chief, Spectrum Engineering
Division

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Caching Technology Corp.
City of Industry, California

NAL/Acct. No.: 315SF0026

Liability for Monetary Forfeiture

ORDER

Adopted: March 22, 1994; Released: March 30, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Bureau has before it a Letter of Explanation filed by Caching Technology Corporation (Petitioner) in response to a Notice of Forfeiture. Although not specifically identified as such, it is being considered as a petition for higher level review filed pursuant to Section 1.106 of the Commission's Rules, 47 C.F.R. § 1.106, requesting reconsideration of the Bureau's February 19, 1993, action finding Petitioner liable for a monetary forfeiture in the amount of $10,000 for violating Section 302(b) of the Communications Act of 1934, as amended, 47 U.S.C. § 302(b), (the Act), and Section 2.803 of the Commission's Rules, 47 C.F.R. § 2.803, by marketing personal computers for which no equipment authorization had been issued by the Commission. As explained below, we are affirming the monetary forfeiture penalty.

2. The appropriate amount for this forfeiture is $10,000.

II. BACKGROUND

3. Our records show that on November 17, 1992, at the Fall Comdex Computer Trade Show in Las Vegas, Nevada, an FCC inspector from the San Francisco Office visited the booth operated by Caching Technology Corporation. He observed an Arima Model SN486SXTC notebook computer on display along with product literature and a price list. An employee assigned to the booth told the inspector that Caching Technology Corp. was the distributor for notebook computers made by another company.

4. On December 31, 1992, pursuant to the forfeiture provisions under Section 503(b) of the Communications Act of 1934, 47 U.S.C. § 503(b), and the authority delegated under Section 0.314 of the Commission's Rules, the San Francisco Office issued a $10,000 Notice of Apparent Liability (NAL) to Caching Technology Corp. for violating Section 302(b) of the Act, 47 U.S.C. § 302(b), and Section 2.803 of the Commission's Rules. 47 C.F.R. § 2.803. On January 11, 1993, Caching Technology Corp. responded to the NAL. Petitioner denied having offered the computers for sale, claiming that they were being used for updating customer lists. After review of the response, the San Francisco Office issued a Forfeiture Order on February 19, 1993, for $10,000. Petitioner replied to the Forfeiture Order by letter dated March 3, 1993, reiterating its previous claim that the computer was being used for updating customer lists at the show rather than being offered for sale. Petitioner also enclosed with that letter a copy of a Commission Grant of Equipment Authorization issued to Arima Computer Corporation for their SN486XTC personal computers. The date of the grant was December 16, 1992.

III. DISCUSSION

5. Section 302(b) of the Communications Act prohibits the marketing of equipment capable of causing radio interference without the required authorization. Commission rules prohibit marketing of personal computers prior to grant of an equipment authorization by the Commission. 47 C.F.R. § 2.803. Petitioner had previously paid a forfeiture for violating the same regulation.[1] The device in question was displayed at a trade show. Exposing or displaying a device or product in a trade show is considered to be the active marketing of that device or product. Even though on-the-spot orders might not be solicited or accepted, the device or product is displayed to potential distributors, retailers, or end-users. The presence of sales literature and a price list further confirms that the product was displayed to solicit sales. Therefore, Petitioner's claim that the computer on display was not for sale is rejected.

6. In the response to the forfeiture notice, Petitioner states that the product in question now has the required equipment authorization. Remedial action to correct a prior violation, although commendable, is not dispositive of the issue of liability, and cannot serve as basis for cancellation of a forfeiture.[2]

7. Petitioner has presented no other new information that was not before the Commission when the forfeiture notice was issued.

IV. CONCLUSION

8. Therefore, for the reasons cited above, we affirm the finding of liability for monetary forfeiture to the amount of $10,000. In determining the amount of forfeiture, the Commission's policy regarding forfeiture adjustments, see *1993 Policy Statement, Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), was taken into consideration. No further adjustments appear warranted.

V. ORDERING CLUASES

9. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b), and Section 1.80 of the Rules, 47 C.F.R. § 1.80, IT IS ORDERED, that Caching Technology Corporation FORFEIT to the United

[1] *See* NAL/Acct. No. 215PO0011, Notice of Apparent Liability, released June 5, 1992; Notice of Forfeiture, released August 5, 1992; paid July 7, 1992.
[2] *See Station KGVL, Inc.*, 42 FCC 2d 258, 259 (1973).

States the sum of ten thousand dollars ($10,000) for the willful violation of Section 302(b) of the Communications Act and Section 2.803 of the Commission's Rules.

10. IT IS FURTHER ORDERED that, pursuant to Section 503(b) of the Act, 47 U.S.C. § 503(b), and Section 1.80(h) of the Commission's Rules, 47 C.F.R. § 1.80(h), that Caching Technology Corporation shall make such payment within 30 days of receipt of this ORDER. Payment should be made by check or money order payable to the Federal Communications Commission.[3] Please place NAL number 315SF0026 on the remittance and send it to:

Federal Communications Commission

P.O. Box 73482

Chicago, Illinois 60673-7482

11. IT IS FURTHER ORDERED that a copy of this Order by sent by Certified Mail, Return Receipt Requested, to Petitioner.

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

[3] Petitioner may contact the Commission's Debt Collection Officer in the Billings and Collections Branch, Stop Code 1110A2, 1919 M Street, N.W., Washington, DC 20554, if it is unable to pay the full amount within the period designated above.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Private Land Mobile Station WSM 534 — NAL/Acct. No. 315NF0016

Chesapeake Bay Contractors, Inc.
Virginia Beach, Virginia

Liability for Forfeiture

ORDER

Adopted: March 22, 1994; Released: March 30, 1994

By the Chief, Field Operations Bureau:

I. INTRODUCTION

1. The Field Operations Bureau, Federal Communications Commission (FCC), has before it a letter from the Vice President of Chesapeake Bay Contractors, Inc., (Chesapeake) Virginia Beach, Virginia, dated June 23, 1993, objecting to a $16,000 monetary forfeiture penalty. This letter is accepted as a Petition for Reconsideration under Section 1.106 of the FCC's rules. 47 C.F.R. Section 1.106.

2. As explained below, the $16,000 monetary forfeiture penalty issued to Chesapeake Bay is reduced to $6,400, and this penalty is affirmed.

II. BACKGROUND

3. On April 14, 1992, an FCC engineer visited the antenna tower structure in Virginia Beach, Virginia, used by Chesapeake as an FCC licensee with the call sign of WSM 534. The FCC engineer found that the tower was not lit as required by the Commission's rules. Furthermore, the paint on the tower failed to provide contrasting colors because it was badly faded and peeling. The resulting poor visibility of the tower impaired the safety of air navigation. This is of especially serious concern because the tower is located within one mile of the Oceana Naval Air Station in Virginia Beach, Virginia.

4. On April 16, 1992, the FCC's Norfolk Office issued an Official Notice of Violation to Chesapeake, and on May 5, 1992, a Continuation of Official Notice of Violation was issued. On May 7, 1992, Chesapeake responded that the tower had been repaired. On February 4, 1993, the FCC's Norfolk Office issued a Notice of Apparent Liability for a $20,000 monetary forfeiture penalty to Chesapeake for willful and repeated violations of Sections 17.24 and 17.50 of the FCC's rules. 47 C.F.R. Sections 17.24 and 17.50. Section 17.24 specifies how this tower should be lit. Section 17.50 requires towers to "be cleaned or repainted as often as necessary to maintain good visibility."[1] The Notice of Apparent Liability pointed out that the usual penalty for this type of violation was $8,000, and indicated that the penalty was increased to $20,000 because the violation continued for at least six days after the FCC inspection of the tower and was corrected only after Chesapeake had been repeatedly contacted by the FCC's Norfolk Office. Chesapeake responded on February 16, 1993. On May 11, 1993, the FCC's Norfolk Office issued a Forfeiture Order to Chesapeake for a $16,000 monetary forfeiture penalty. The penalty was reduced from $20,000 to $16,000 because of lack of evidence that Chesapeake had previously violated the FCC's rules. The FCC's authority to impose monetary forfeiture penalties for violations of its rules is contained in Section 503(b) of the Communications Act. 47 U.S.C. Section 503(b).

III. DISCUSSION AND CONCLUSION

5. Chesapeake explains that when it received its initial license from the FCC in 1980, the license did not require that the tower be painted and lit. Chesapeake further explains that it relocated its tower in 1987, and it relied on the company that relocated the tower to install it in compliance with the FCC's rules. However, Chesapeake admits that its FCC license issued on January 5, 1988, and in effect at the time of the violation in 1992, contained "Painting and Lighting Specifications" which it "simply overlooked."

6. An FCC licensee may not delegate its responsibility to comply with the FCC's rules, and is held responsible for the acts of its agents and similarly situated persons. *Liability of MTD*, 6 FCC Rcd 34 (1991). Furthermore, a licensee is required to comply with the provisions in its license and the FCC's rules, and "oversight or failure to acquaint itself with the Commission's requirements will not excuse" a violation. *Triad Broadcasting Co., Inc.*, 96 FCC 2d 1235, 1242; 55 RR 2d 919, 924 (1984). *See also Southern California Broadcasting Company*, 6 FCC Rcd 4387 (1991). It is especially serious when a licensee overlooks a requirement that has been in its license for more than four years. Violations, moreover, that result from so-called inadvertent or clerical mistakes are subject to monetary forfeiture penalties. *PJB Communications of Virginia, Inc.*, 7 FCC Rcd 2088 (1992); *Standard Communications Corporation*, 1 FCC Rcd 358 (1986).

7. Chesapeake also explains that its tower was not a hazard to air traffic since the length of the tower was only approximately eighty-eight feet and "trees in close proximity are within a few feet of the height of the tower." The usual time to seek an exemption from the FCC's rules is before a violation occurs not after a violation.

8. It was, moreover, the belief of the FCC engineer that inspected the tower that its unlit and unpainted condition presented a serious danger to aircraft because of the closeness of the tower to an airfield, and because it would be difficult to observe the thin tower structure from a moving aircraft whereas trees are readily apparent. The FCC engineer was so concerned that he urged Chesapeake several

[1] Sections 17.22 and 17.23 of the FCC's rules specify how towers should be painted. 47 C.F.R. Sections 17.22 and 17.23.

times to immediately place temporary lights on the tower while Chesapeake sought to bring the tower into compliance with the FCC's rules, and he understood that Chesapeake had agreed to do this. Radio antenna structures present a very real hazard to aircraft, and there have been serious accidents involving aircraft and towers. *See Radio Beaumont,* 13 FCC 2d 965, 966 (1968). Although Chesapeake may believe that the probability of this occurring at its tower is low, the action needed to bring the tower into compliance does not appear to be very burdensome and significantly reduces the possibility of an accident and loss of life.

9. The FCC's Notice of Apparent Liability and Forfeiture Order issued to Chesapeake stated that the violation was willful. Chesapeake denies this because "there was no premeditated ... intent to violate your rules." Section 312(f)(1) of the Communications Act defines "willful" as "the conscious and deliberate commission or omission of such act, irrespective of any intent to violate any provision of this Act ... ." 47 U.S.C. Section 312(f)(1). This definition was intended by Congress to apply to the word willful as used in Section 503 of the Communications Act to assess forfeiture penalties. H.R. CONF. REP. N0. 97-765, 97th Cong., 2d Session (1982), *reprinted in* 1982 U.S. CODE CONG. & ADMIN. NEWS 2294-95. Thus, willfulness exists if there is a voluntary act or omission in that a person knew that he was doing the act in question as opposed to being accidental (such as brushing against a power switch turning on a radio transmitter). Furthermore, to establish a willful violation, it is not necessary to show that a person knew he was acting wrongfully. *See Southern California Broadcasting Company,* 6 FCC Rcd 4387 (1991). A violation, moreover, resulting from an inadvertent mistake or a failure to become familiar with the FCC's requirements is considered a willful violation. *PJB Communications of Virginia, Inc.,* 7 FCC Rcd 2088 (1992); *Standard Communications Corporation,* 1 FCC Rcd 358 (1986); *Triad Broadcasting Co., Inc.,* 96 FCC 2d 1235, 1242; 55 RR 2d 919, 924 (1984). In the instant case, inaction on the licensee's part (failure to properly light the tower and maintain paint) resulted in violation of the Commission's rules.

10. Finally, Chesapeake denies that the violation was repeated. Chesapeake explains that the day after its tower was inspected by the FCC engineer, it entered into a contract to have the tower repaired, and that these repairs were completed ten days later after some delay because of bad weather and a weekend. However, the FCC engineer understood that Chesapeake had agreed to place temporary lights on the tower immediately while it was being repaired because of its nearness to an airfield, and Chesapeake failed to do so despite repeated contacts from the FCC engineer. If only these factors were involved, they would add to the seriousness of the violation and justified additional penalties for repeated violations. However, it is also recognized that Chesapeake promptly painted and lit the tower to comply with the FCC's rules. Therefore, the violation is not considered to be repeated and the appropriate monetary forfeiture penalty is $8,000. This penalty is reduced to $6,400 because of lack of evidence concerning past noncompliance with the FCC's rules.

11. In determining the amount of this monetary forfeiture penalty, consideration was given to the FCC's standards for assessing forfeiture penalties. *Policy Statement, Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993). No further adjustments appear warranted.

IV. ORDERING CLAUSES

12. IT IS ORDERED that pursuant to Section 503(b) of the Communications Act of 1934 and Section 1.106 of the FCC's rules, the monetary forfeiture penalty imposed on Chesapeake is reduced from $16,000 to $6,400, and that otherwise the relief sought by Chesapeake is DENIED. 47 U.S.C. Section 503(b), 47 C.F.R. Section 1.106.

13. IT IS FURTHER ORDERED that Chesapeake submit the $6,400 monetary forfeiture penalty within 30 days of the receipt of this Order. Payment may be by check or money order payable to the Federal Communications Commission. Please place the forfeiture account number 315NF0016 on the remittance, and send it to:

Federal Communications Commission

Post Office Box 73482

Chicago, Illinois 60673-7482

14. IT IS FURTHER ORDERED that a copy of this Order shall be sent certified mail, return receipt requested, to Chesapeake Bay Contractors, Inc.,

FEDERAL COMMUNICATIONS COMMISSION

Richard M. Smith
Chief, Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PP Docket No. 93-21

In the Matter of

Implementation of Section 26 of the
Cable Television Consumer Protection
and Competition Act of 1992

Inquiry into Sports Programming
Migration

FURTHER NOTICE OF INQUIRY

Adopted: March 10, 1994; Released: March 11, 1994

Comment Date: April 11, 1994
Reply Comment Date: April 26, 1994

By the Commission:

I. INTRODUCTION

1. Section 26 of the Cable Act of 1992,[1] directs the Federal Communications Commission to examine carriage of sports programming by television broadcast stations and by subscription media, to submit reports to Congress on or before July 1, 1993 and July 1, 1994, and to make "such legislative or regulatory recommendations as the Commission considers appropriate." The Commission issues this *Further Notice of Inquiry* (*"Further Notice"*) in order to update the record in its sports programming migration docket and gather the necessary additional information to compile its Final Report to Congress, due July 1, 1994.

2. The Cable Act of 1992 directs the Commission to examine, on a sport-by-sport basis, trends in the migration of sports programming from broadcast television to cable programming networks and pay-per-view services. The analysis is to include an attempt to project future patterns of carriage and an examination of the causes and consequences of migration. Moreover, the 1992 Act instructs the Commission to "analyze the extent to which preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of sporting events of local colleges for broadcast on local television stations."

3. The Commission began its sports programming investigation with a *Notice of Inquiry*, released February 9, 1993, and issued an *Interim Report* to Congress on July 1, 1993.[2] The Commission adopted the following operational definition of sports programming migration: "the movement of sports programming from broadcast television to a subscription medium (*i.e.*, one for which viewers pay a fee.)," and noted that an increase in the number of games exhibited over subscription media of a particular team or league would not, in and of itself, constitute migration.[3] In order to assess migration, it is necessary to track over time the number and type of games actually exhibited over broadcast television.

4. The Commission's initial inquiry emphasized four professional sports--football, basketball, baseball, and hockey--and college football and basketball. Moreover, the inquiry focused on the period since 1980, due to the limited scope and availability of subscription media in earlier years. The *Interim Report* found that the number of sports events shown on cable has increased since 1980, but tentatively concluded that this is not associated with a decline in broadcasts of sporting events. In some cases, broadcast exposure has also increased.

5. The Commission supplemented these general observations with specific tentative findings for each of the six sports mentioned above. (*See Interim Report* at para. 86.) It found no evidence of migration in the case of the National Football League (NFL) and college basketball. With regard to the other three professional sports leagues the National Basketball Association (NBA), Major League Baseball (MLB), and the National Hockey League (NHL), the Commission tentatively concluded that, while there had been no migration at the national level, "isolated and relatively slight" migration at the local level had occurred. The Commission also stated its belief that college football games previously available to broadcast television had not moved to cable, but emphasized that more information regarding preclusive contracts was needed before reaching a firm conclusion regarding whether the supply of games to local television stations has been "artificially and unfairly restricted." (1992 Cable Act, Sec. 26(c)(1))

6. In the *Interim Report* the Commission enumerated certain topics for further investigation in the *Further Notice*. (*See* paras. 63, 66, 75-77, 87.) Moreover, the Honorable Edward Markey, Chairman of the Subcommittee on Telecommunications and Finance of the House Energy and Commerce Committee, has suggested some additional lines of inquiry.[4] Additionally, the Commission has before it a

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[1] Cable Television Consumer Protection and Competition Act of 1992, Pub. L. No. 102-385, 106 Stat. 1460 (1992).

[2] *Notice of Inquiry* in PP Docket No. 93-21, 8 FCC Rcd 1492 (1993); *Interim Report* in PP Docket No. 93-21, 8 FCC Rcd 4875 (1993).

[3] *Notice of Inquiry* at para. 2. See also *Interim Report* at paras. 8-11, noting, *inter alia*, that "[W]hile the optimal method of measuring sports migration would be... a comparison of the number of games and viewership of events actually shown on broadcast television with the projected number of games and viewership of events that would be broadcast absent the existence of non-broadcast video distributors, such projections are too speculative to form the basis for this study" (citation omitted). An increase in the number of games exhibited via subscription media could occur along with an increase in the number of games exhibited via broadcast media. Even if the number of games exhibited via broadcast media did not increase, subscription video exhibition could increase the total number of games available to viewers. These considerations underlie the Commission's conclusion that an increase in the number of games exhibited via subscription media would not, in and of itself, constitute migration.

[4] Letter from the Honorable Edward J. Markey, Chairman, Subcommittee on Telecommunications and Finance, Committee

"Petition for Clarification" of the *Interim Report* from Capital Cities/ABC ("CapCities/ABC Petition") and an "Opposition to Petition for Clarification of Independent Television Stations" ("INTV Opposition").[5] After outlining the scope of this Further Notice, based on these items and events subsequent to issuance of the *Interim Report*, we will devote a section of this *Further Notice* to professional sports, a section to college sports, and a section to conclusions and administrative matters.

II. THE SCOPE OF THE FURTHER NOTICE

7. In the *Interim Report*, the Commission indicated that it would seek information about recent television and cable contracts negotiated by the NFL, the NBA, and MLB[6] and about divisional realignments, particularly with respect to the NHL and MLB. With regard to college sports, the Commission noted the need for more data on local telecasts of college football and basketball games. Moreover, the Commission highlighted the need for additional information about contracts between college football conferences and video programming vendors, in order to determine if such contracts are, in fact, preclusive. Because the Commission found in the *Interim Report* that the term "video programming vendor" applies to broadcast networks as well as cable networks, we now seek additional information regarding contracts now in effect between college football conferences and ABC as well as contracts with ESPN and regional cable networks. We also wish to determine the terms of the new contracts that college conferences have signed with broadcast and cable networks. For example, the Southeastern Conference and the Big East have signed with CBS and the Atlantic Coast Conference has signed with ABC and ESPN.[7]

8. In order to carry out its statutory mandate to analyze the impact of "preclusive contracts" on the availability of local college sporting events to local television broadcast stations, and, in consultation with the Attorney General, to "determine whether and to what extent such preclusive contracts are prohibited by existing statutes," (1992 Cable Act, Sec. 26(c)), the Commission stated its intention to use the "rule of reason" test applied by the United States Department of Justice to analyze some antitrust matters. (*Interim Report* at para. 77) Application of the "rule of reason" test entails delineating relevant product and geographic markets, assessing the degree of market power possessed by college leagues and programmers, evaluating whether contracts between video programmers and college leagues permit the achievement of efficiencies that could not be readily achieved in another manner, and determining whether these contracts limit or increase the quantity of sports programming telecast. The CapCities/ABC Petition requests the Commission not to "seek to determine whether any preclusive college sports contracts violate the antitrust laws." Rather than conduct an antitrust adjudication, asserts CapCities/ABC, the Commission's statutory instructions are to determine, "as a matter of communications policy" whether preclusive contracts have artificially and unfairly restricted the supply of college sports events to local stations, and then to report to Congress, making any necessary and appropriate legislative recommendations. CapCities/ABC suggests that the Congressional instruction to the Commission to consult with the Attorney General regarding whether preclusive contracts are prohibited by existing statutes is designed to help the Commission judge whether public interest considerations other than those addressed by antitrust law suggest the need for legislation. Cap/Cities ABC urges that antitrust adjudication is a time-consuming process that could not be completed within the deadlines imposed by Congress.

9. The INTV Opposition agrees that the Commission should not attempt to "specifically adjudicate the issue of whether any particular contract violates the antitrust laws." However, INTV asserts that, in evaluating preclusive contracts with respect to fundamental communications policy objectives, the Commission can and should take notice of antitrust considerations as part of a broader communications policy analysis.

10. It is not our intention to adjudicate whether specific contracts violate the antitrust laws. Consistent with our statutory mandate, however, we will address in our report to Congress, after further consultation, if appropriate, with the Department of Justice, "whether and to what extent" preclusive contracts "are prohibited by existing statutes," including the antitrust laws. In addition, we agree with INTV that analytical tools drawn from antitrust law are an appropriate and useful component of our broader public interest examination of preclusive contracts. *Cf. FCC v. National Citizens Commitee for Broadcasting*, 436 U.S. 775, 795 (1978).

11. We emphasize that the public interest encompasses more than antitrust concerns and we invite comment on whether there is a public interest in government action to promote free access to sports programming. For example, INTV suggests in its Opposition and in its earlier comments that the Commission can and should adopt sports siphoning rules. Commenters who believe that sports programming migration and/or preclusive contracts on balance harm the public interest should specify what should be done to remedy the situation. Those advocating Commission rules should address the Commission's authority to adopt such rules in light of *Home Box Office v. FCC*[8] and any relevant changes in circumstances since that case was decided in 1977.

12. The Commission also noted in the *Interim Report* the need for information regarding the cost of subscribing to the cable services that provide sports programming. We therefore seek information regarding subscription rates for

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on Energy and Commerce, U.S. House of Representatives to the Honorable James H. Quello, Acting Chairman, Federal Communications Commission, July 22, 1993.

[5] "Petition for Clarification" of Capital Cities/ABC, Inc. ("CapCities/ABC") and ESPN, Inc. in PP Docket No. 93-21, filed July 30, 1993. "Opposition to Petition for Clarification" of the Association of Independent Television Stations, Inc. ("INTV") in PP Docket No. 93-21, filed Sept. 16, 1993.

[6] *See* notes 12, 14, and 16 below.

[7] *See* "CBS Gets Deal With Big East," *New York Times*, Feb. 16, 1994, p. B13. *See also* note 18 below. We also note that the Big Eight conference, augmented by four new members from the Southwestern conference, is negotiating about new television contracts. *See* Ivan Maisel, "Death of a League: Here's how SWC went from scattered to split in 11 days," *Dallas Morning News*, Feb. 27, 1994, p. 1B.

[8] 567 F.2d 9 (D.C. Cir. 1977).

regional sports channels and whether these channels are available on a tiered or a la carte basis. Such information will be useful in assessing the impact of present or future sports programming migration. That impact can be divided into two broad components, price and availability. The overwhelming majority of United States television households (more than 95 percent) are passed by cable, and many households that are not have access to direct-to-home satellite services.[9] We recognize that some households do not have access to non-broadcast services and we seek comment on where they are located, in order to determine if access problems disproportionately affect potential viewers of certain teams' games.[10] However, for most television households, the issue is price.

13. The Congressional letter cited above at para. 6 suggests that the Commission examine six topics as it moves toward a final sports programming migration report. They are: (1) why the increase since 1980 in cable exhibition of sporting events has been much greater than the increase in broadcast exhibition; (2) trends in cable and broadcast exhibition at the local as well as the national level; (3) pay-per-view exhibition of sports events and its impact on future patterns of sports programming exhibition; (4) the effect of college football contracts on local availability of sports programming; (5) the impact of expected vast increases in channel capacity for subscription media and the adoption of video-on-demand technologies on the availability of sporting events on free television; and (6) sports antitrust exemptions and their effect on the sports programming market. There is substantial information in the record on these matters. We hereby invite interested parties to supplement that record with regard to these issues in response to this *Further Notice*.

14. With regard to the first issue, commenters responding to the *Notice of Inquiry* in this proceeding have suggested several factors that might explain this phenomenon. For example, there has been a significant increase in the number of channels devoted exclusively or primarily to sports programming. Also, the base level of broadcast exhibition in 1980 was far greater than the base level of cable exhibition. These factors raise the possibility that there was more "room for expansion" in cable exhibition than in broadcast exhibition. We seek comment on these and other possible explanations for the fact that most of the increase in availability of sports programming has been via pay services rather than over-the-air television.

15. The impact of new technology and capacity expansion on sports programming availability (issue five) is clearly related to the question of how PPV will develop. While we recognize that accurate predictions of these developments are difficult, we specifically request comment on the impact of these new technologies on the availability of sports events on broadcast television. In particular, we seek comment from the relevant sports leagues and teams, professional and collegiate, on any plans they might have to utilize expanded channel capacity and video-on-demand technology. We are interested not only in the direct impact of these technologies but on how they might change viewer habits and the way that viewers, sports fans in particular, might utilize subscription video media.

16. We sought comment on the antitrust exemptions (issue six) earlier in this proceeding, but few commenters addressed this issue. Those who did generally cited the Sports Broadcasting Act and concluded that it benefits viewers by assuring widespread availability of professional sporting events and suggested that shared revenues from television contracts have permitted expansion in the number of teams in professional sports leagues and thus increased the number of games telecast. We invite additional comment on the impact of the antitrust exemptions on sports programming availability.

17. While the Commission has focused its sports programming migration inquiry on particular sports and a specific time period, we do not wish to limit commenters' discretion to identify relevant matters. We therefore invite comment on any other sports (*e.g.*, the Olympics) or relevant topics not specifically identified in the *Further Notice*.

III. PROFESSIONAL SPORTS

18. In this section, we seek comment on recent developments and trends in the exhibition of professional sports programming. We address the four major professional sports specifically in the following subsections, but also seek any relevant information regarding other professional sports. Several parties filed statements with the Commission after the formal comment and reply comment periods on the *Notice of Inquiry* in this proceeding closed. In order to ensure as full a record as possible, we shall accept and consider these late filed pleadings (and other late filed pleadings that address college sports).

A. Professional Football

19. In the *Interim Report*, the Commission found that professional football has experienced no migration and noted that every NFL game is available on broadcast television, at least in the home market of the visiting team.[11] Since the *Interim Report*, the NFL has signed new exhibition agreements with several broadcast and cable television networks.[12] We request information on exhibition of NFL regular and post-season games pursuant to those contracts. In particular, we seek comment on whether the movement of National Football Conference games from CBS to Fox will affect the availability of games via broadcast television. We also note that the NFL has announced plans to scramble its satellite feeds and sell packages of games to home satellite dish owners and to commercial establishments

[9] *See* Paul Kagan Associates, *Marketing New Media*, Aug. 16, 1993, p. 3 (projecting that, as of August 31, 1993, 98 percent of U.S. television households were passed by cable and four percent of U.S. television households had home satellite dish systems).

[10] We also invite evaluation of the figures cited in the previous note for cable homes passed and home satellite dish households.

[11] Games are also available on broadcast television in the market of the home team, provided that the game is sold out at least 72 hours in advance of the game. *See* Comments of the National Football League in PP Docket No. 93-21(filed March 29, 1993) at 8.

[12] See Richard Sandomir, "Fox Network's Bid Beats CBS for Rights to N.F.C. Football," *New York Times*, Dec. 18, 1993, p. 1; Mark Asher, "ABC, ESPN, TNT Retain NFL Rights," *Washington Post*, Dec. 19, 1993, p. D1; Leonard Shapiro and Mark Asher, "NBC Retains AFC Rights," *Washington Post*, Dec. 21, 1993, p. E1.

such as sports bars.[13] We request information on the schedule for scrambling and the terms (including cost) under which games will be made available to sports bars and dish owners. Additionally, we seek comment on whether this development has any implications for future offering of NFL games to other audiences on a subscription basis.

B. Professional Basketball

20. The *Interim Report* found that there has not been significant migration of professional basketball telecasts from broadcast to cable television, either at the national or the local level. The record contains some discussion of declines over time in local exhibition of New York Knicks and Philadelphia 76ers games, and we understand that the Portland Trailblazers have offered some regular season and playoff games via PPV. We invite commenters to supplement the record on these matters if additional relevant information is available, as well as to offer any other information relevant to sports programming migration in the NBA context. Specifically, with regard to the 76ers, we understand that the current local television broadcast contract expires after the 1993-1994 season. We seek comment on whether a new contract has been negotiated, and if it has, on the terms thereof, in order to resolve speculation in the record about the number of 76ers games that will be on broadcast television during the 1994-95 season.

21. We also seek comment on the new contracts that the NBA has recently signed with NBC and TNT for national exhibition of league games.[14] In a late-filed submission, the NBA explained that its new contract contains certain limitations on superstation telecasts of league games and that these limitations were the subject of litigation. We seek comment on these limitations and on the status of the relevant litigation.

C. Professional Baseball

22. The *Interim Report* found that, since 1980, there has been a significant decline in the number of national, regular season television broadcasts of Major League Baseball games. However, the drop appears to be a function of declining ratings rather than migration to cable. At the local level, the record is slightly more ambiguous, with some teams experiencing a decrease in the number of games broadcast over local television. Some information on these matters is already in the record. We invite interested parties to update and supplement this material as appropriate and to comment on these and other local MLB broadcast and cable television exhibition schedules, including any actual or planned pay-per-view exhibitions. We note that Madison Square Garden Network and WPIX-TV have reached an agreement for over-the-air carriage of 50 New York Yankees games per year for the next three years.[15] We request that the parties to the contract provide us with information on its terms.

23. The *Interim Report* quoted press reports regarding a new contract with ABC and NBC about to be approved by MLB. Moreover, we understand that MLB has also reached agreement with ESPN on a new national cable contract.[16] We seek information and comment on the relevant terms of these agreements. In particular, what are the provisions for broadcasting of regular season and post-season games? How will the number of post-season games change, and how will this number be affected by the new divisional alignments recently adopted by MLB? What are the exclusivity provisions of these contracts, in particular that with ESPN? What will be the impact of these provisions on local telecasts and on superstation telecasts of MLB games?

24. We also seek comment on the negotiations over sharing revenue from local telecasts of MLB games between the two opposing teams.[17] What effect, if any, will this have on local telecasts? Additionally, we seek comment on any other MLB topics relevant to our sports programming migration inquiry.

D. Professional Hockey

25. The *Interim Report* found that, with the exception of the NHL All Star games since 1990 and a few Stanley Cup games in 1993, there was no national broadcast television carriage of NHL games after 1980. It appears that cable has provided the national outlet for hockey during 1980-93, but that there are limited prospects for increased national television coverage of a limited number of post-season games. The *Interim Report* noted a 14 percent decline in local games broadcast between 1981-82 and 1992-93, but it was not possible to establish a single cause for the decline. The Commission indicated that NHL broadcasts could have declined due to the increase in cable availability or to weakening demand, possibly caused by increased popularity of some or all of the several other fall and winter sports.

26. While there is some information already in the record on these matters, we invite additional comments. We seek comment on any aspects of actual or potential sports programming migration of NHL games. Particular areas of interest include PPV exhibition of playoff games by the Chicago Blackhawks and the (former) Minnesota North Stars, and the decline in the number of New York Rangers games on broadcast television. We also explicitly include in our request information on "reverse migration" and ask whether any decision has been made regarding additional national television broadcast exhibition of NHL games (postseason or regular season) for the current season.

IV. COLLEGE SPORTS

27. As noted above at para. 7, we seek comment on local telecasts of college basketball and football games. The *Interim Report* found no evidence of migration of college basketball games to subscription media. Moreover, the Commission found that concerns with respect to preclusive

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[13] See "NFL Confirms Scrambling, Sales Plans," *Satellite Business News*, Jan.12, 1994, pp. 1, 25.

[14] See Steve McClellan, "NBC-NBA deal: $750 million + revenue sharing," *Broadcasting and Cable*, May 3, 1993, p. 14; and "Turner gets four more years of roundball," *Broadcasting and Cable*, Sept. 27, 1993, p. 28.

[15] *See Communications Daily*, Mar. 3, 1994 at 7.

[16] See Steve McClellan, "Baseball approves deal with ABC, NBC," *Broadcasting and Cable*, May 31, 1993, p. 11; Rich Brown, "More post-season games for MLB," *Broadcasting and Cable*, Sept. 13, 1993, p. 15.

[17] See, *e.g.*, *Broadcasting and Cable*, Jan.10, 1994, p. 15.

contracts arose almost exclusively in the college football context. Thus, while we seek any additional information available regarding possible examples of migration or preclusive contracts in the college basketball context, we place a higher priority on obtaining supplementary information on local telecasts of college football games. Our analysis of college sports will emphasize football.

A. College Football and Preclusive Contracts

28. The *Interim Report* tentatively concluded that college football games previously available to broadcast television had not migrated to cable, but noted the need for additional information regarding local telecasts of college football games and preclusive contracts between video programming vendors and college football conferences. We hereby request comment on these matters. We are especially interested in comments from regional cable sports networks and the college football conferences with which they have contracts and comments from local broadcasters detailing any difficulties that they have had in obtaining rights to broadcast games of their local colleges, home games in particular.

29. With respect to local broadcasters' attempts to secure television exhibition rights, we seek comment on the impact of the provisions in the ABC and ESPN contracts that permit the networks to make telecasting decisions on 12 days notice (six days notice in a limited number of cases). Also, for games not nationally televised, does the provision permitting local telecast within the ADI markets of the participating teams make such telecasts economically viable? If not, what sort of larger "local" territory might make these telecasts profitable?

30. There is a substantial amount of information in the record regarding the national contracts between ABC/ESPN and the College Football Association (CFA) and the Big Ten/Pacific 10. However, we note that several CFA conferences have signed separate contracts with ABC or CBS for carriage of their games beginning in 1996.[18] We invite the relevant parties to provide more complete explanations of the exclusivity provisions of their contracts, along the lines outlined at para. 75 of the *Interim Report*.

31. In order to "determine whether and to what extent ... preclusive contracts are prohibited by existing statutes" (1992 Cable Act, Section 26(c)(1)), we seek comment on the relevant product and geographic markets for college football telecasts, the magnitude of market power possessed by college leagues and programmers, and the extent and magnitude of any efficiencies that the contracts between college football conferences and video programming vendors might permit. One relevant issue here is the possible tradeoff between increased national exposure for teams in important games versus the limitations on local telecasts imposed by the 12 day rule. Broadly speaking, the question that we draw from antitrust analysis in examining preclusive contracts is whether such contracts increase or decrease output, *i.e.*, the quantity and/or quality of sports programming telecast. As noted above at para. 10, we are not attempting to make a specific adjudication regarding violations of the antitrust laws, although, after further consultation with the Department of Justice as appropriate, we will comply with the statutory mandate regarding whether and to what extent preclusive contracts are prohibited by existing statutes, including the antitrust laws. Moreover, as part of our broader review, we are drawing on competition law principles in order to make a public interest determination as to whether "preclusive contracts between college athletic conferences and video programming vendors have artificially and unfairly restricted the supply of the sporting events of local colleges for broadcast on local television stations."[19] Based on that determination, we will make legislative recommendations if appropriate, and, if convinced of the need and our authority (*see* para. 11 above) to do so, we may propose new Commission regulations regarding sports programming.

32. We also seek comment on the following specific issues relating to college football. What is the role of PPV in delivering college football telecasts? In particular, we would like to obtain data on the PPV programs of the University of Tennessee, the University of Arkansas, the University of Miami, Louisiana State University, and Notre Dame University. We also ask for information on ABC's plans to deliver out-of-market college football games via PPV. Additionally, we seek comment on how and to what extent PPV offerings of college football and other college sports are likely to evolve. Commenters are also invited to submit information on any other college sports matter relevant to the Commission's sports programming migration investigation.

VI. CONCLUSIONS AND ADMINISTRATIVE MATTERS

33. We encourage comments from the sports leagues and teams, from players' organizations, from universities and college athletic conferences, from broadcast, cable, and other delivery media, from sports programmers, from relevant government agencies, and from other interested parties. Should any party wish to submit confidential information, the Commission has procedures for protecting it.[20]

34. This Further Notice is issued pursuant to authority contained in the Cable Television Consumer Protection and Competition Act of 1992, Section 26, and Sections 4(i), and 403 of the Communications Act of 1934, as amended, 47 U.S.C. 154(i), and 403. Pursuant to applicable procedures set forth in Sections 1.415 and 1.419 of the Commission's Rules, 47 C.F.R. §§ 1.415 and 1.419, interested parties may file comments on or before April 11, 1994, and reply comments on or before April 26, 1994. To file formally in this proceeding, you must file an original and four copies of all comments, reply comments, and supporting comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original plus nine copies. You should send comments and reply comments to Office of the Secretary, Federal Communications Commission, Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center (Room 239) of the Federal Communications Commission, 1919 M Street, N.W., Washington, D.C. 20554.

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[18] See "Football rights up for grabs," *Broadcasting and Cable*, Feb. 21, 1994, p. 15.

[19] 1992 Cable Act, Section 26(c)(1). As stated earlier, in the *Interim Report* at paras. 73-74, we concluded that "video programming vendors" includes broadcast networks as well as cable networks.

[20] See 47 C.F.R. §§ 0.457(d), 459, and 461. *But cf.* 47 C.F.R. § 0.442.

35. Accordingly, the CapCities/ABC Petition is GRANTED to the extent specified herein and otherwise DENIED.

36. For further information concerning this proceeding, contact Jonathan D. Levy, Office of Plans and Policy, (202) 653-5940.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

Before the
Federal Communications Commission
Washington, D.C. 20554

PR Docket No. 93-61

In the Matter of

Amendment of Part 90 of the
Commission's Rules to Adopt
Regulations for Automatic
Vehicle Monitoring Systems

ORDER

Adopted: March 17, 1994; Released: March 18, 1994

By the Deputy Chief, Land Mobile and Microwave Division:

1. In late January and early February 1994 the Commission received written ex parte presentations from PacTel Teletrac (PacTel), Southwestern Bell Mobile Systems, Inc. (SBMS) and Mobilevision concerning the licensing of Automatic Vehicle Monitoring (AVM) systems, currently under consideration in this docket.

2. On February 9, 1994, the Bureau issued a Public Notice soliciting additional comments and reply comments on these filings.[1] The Public Notice established a due date of February 25, 1994 for comments and March 7, 1994 for reply comments. On February 25, 1994, the Bureau released an Order extending the due dates to **March 15, 1994**, for comments and **March 22, 1994**, for reply comments.[2]

3. On March 15, 1994, Pinpoint Communications, Inc. (Pinpoint) requested additional time to file reply comments. Pinpoint bases this request on the need for close review of the comments by its technical personnel and on the opportunity that additional time may provide "to determine if some consensus might be reached concerning wide area operation in this band."[3]

4. For good cause shown, and pursuant to Sections 4(j) and 303(r) of the Communications Act of 1934, as amended, 47 U.S.C. §§ 154(j) and 303(r), IT IS ORDERED THAT the period of time for reply comments on ex parte filings addressed in our Public Notice, DA 94-129, released on February 9, 1994, IS HEREBY FURTHER EXTENDED. Reply comments must be filed on or before **March 29, 1994**.

5. To file formally in this proceeding, you must file an original and four copies of all comments and reply comments. If you want each Commissioner to receive a personal copy of your comments, you must file an original and nine copies. Comments and reply comments must be sent to the Office of the Secretary, Federal Communications Commission, Washington, DC 20554.

6. Ex parte filings, as well as all comments and reply comments in this proceeding, are available for public inspection as part of the record in PR Docket No. 93-61 during normal business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. All or part of the text of these filings may be purchased from the Commission's copy contractor, International Transcription Service, 1919 M Street, N.W., Room 246, Washington, DC 20554, telephone (202) 857-3800.

FEDERAL COMMUNICATIONS COMMISSION

Edward R. Jacobs
Deputy Chief, Land Mobile and
Microwave Division

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[1] Public Notice, DA 94-129, PR Docket No. 93-61, 59 Fed. Reg. 7239 (February 15, 1994).

[2] Order, DA 94-178, PR Docket No. 93-61, 59 Fed. Reg. 10107 (March 3, 1994).

[3] Motion for Extension of Time of Reply Comments filed by Pinpoint, March 15, 1994, at 2.

Before the
Federal Communications Commission
Washington, D.C. 20554

MM Docket No. 93-298

In re Application of

DAVID LEE COMMUNICATIONS, INC. File No. BR-890602UJ

For Renewal of License
of Station WTRX(AM),
Flint, Michigan

Appearances

Arthur V. Belendiuk, on behalf of David Lee Communications, Inc.; and *James W. Shook*, on behalf of the Mass Media Bureau.

SUMMARY DECISION OF ADMINISTRATIVE LAW JUDGE JOSEPH CHACHKIN

Issued: March 25, 1994; Released: March 31, 1994

PRELIMINARY STATEMENT

1. The *Hearing Designation Order* (HDO) issued by the Chief, Audio Services Division, Mass Media Bureau, specified the following issues against David Lee Communications, Inc. (Lee).

> (a) To determine whether David Lee Communications, Inc. has the capability and intent to expeditiously resume broadcast operations of WTRX(AM) consistent witih the Commission's Rules.
>
> (b) To determine whether David Lee Communications, Inc. has violated Sections 73.1740 and/or 73.1750 of the Commission's Rules.
>
> (c) To determine, in light of the evidence adduced pursuant ,to the preceding issues, whether grant of the subject renewal of license application would serve the public interest, convenience and necessity.

8 FCC Rcd 8412 (MMB 1993).

2. On March 1, 1994, Lee filed a motion for summary decision seeking resolution of the designated issues in favor of Lee. On March 15, 1994, the Bureau filed comments and a countermotion for summary decision. The Bureau agrees with Lee that summary decision is appropriate. It urges, however, that Lee violated Section 73.1740 of the Rules and that an appropriate sanction is grant of renewal of Lee's license for a short term to end October 1, 1995, one year before the term would ordinarily end. Lee does not oppose the request for a short term renewal.[1]

FINDINGS OF FACT

3. The basic facts are not in dispute. Lee became licensee of Station WTRX(AM) on June 2, 1989, pursuant to an assignment of license (See File No. BAL-890210EB). On June 2, 1990, Lee filed its application for renewal of license. While its renewal application was pending, Lee ceased broadcast operations on Station WTRX(AM) on August 20, 1990. On September 10, 1990, Lee requested authority to suspend its operations, citing financial difficulties. Motion for Summary Decision, Exhibit 1, p. 1. By letter dated October 29, 1990, Lee was granted special temporary authority to remain silent through November 30, 1990. Thereafter, shortly before its authority to remain silent expired, Lee periodically submitted requests for continued authority to remain silent. See Attachments A through D; Motion for Summary Decision, Exhibit 1, pp. 3-4. Generally, the staff granted Lee's requests within a few weeks of their submission. See attachments E and F; Motion for Summary Decision, Exhibit 1, p. 5.

4. On December 18, 1992, Lee again requested an extension of its authority to remain silent. Lee related that it was "still in the process of working on the financial aspect of returning" its station to the air and that it was "currently negotiating with several investors ... to provide the necessary funding ...." Motion for Summary Decision, Exhibit 1, pp. 7-8. Lee's request was granted by letter dated January 29, 1993. Therein, Lee was advised that any further requests for authority to remain silent "must be accompanied by a detailed summary of steps taken to return the station to on-air operations."[2] Motion for Summary Decision, Exhibit 1, p. 9.

5. On April 13, 1993, Lee submitted its final request for authority to remain silent. Motion for Summary Decision, Exhibit 1, pp. 10-11. Except for the date, Lee's letter was identical to its letter of December 18, 1992. By letter dated April 30, 1993, the staff found Lee's letter insufficient to warrant any further extension of its authority to remain silent, and gave Lee 30 days in which to provide a "detailed explanation of the specific steps you have taken and plan to take to return your station to the air. This may include, but is not limited to, a marketing plan, proof of listing with a broker, a list of prospective investors or buyers contacted and all other positive efforts made to sell the station." Motion for Summary Decision, Exhibit 1, pp. 12-13.

6. Lee's late filed response, dated June 3, 1993, enclosed a bank commitment letter and related that Lee was "currently in the process of negotiating a merger with a local station which we expect would ... put the station back on air in a relatively short period of time." Motion for Summary Decision, Exhibit 1, p. 14. However, the commitment letter said nothing about providing funds for resumption of

[1] On March 16, 1994, Lee filed a Reply to the Bureau's Comments. Section 1.25 of the Rules does not provide for the filing of a Reply. However, Lee's pleading will be treated as a response to the Bureau's countermotion.

[2] A staff letter, which granted Lee's September 15, 1992, request, was virtually identical to the staff's January 29, 1993, letter. See Motion for Summary Decision, Exhibit 1, pp. 6 and 9; and Attachment D.

broadcast operations on Station WTRX(AM) and it did not indicate how much money, if any, would be left after payment of an existing debt. Moreover, the commitment letter expressly stated that it would expire at the bank's option if, among other things, the loan was not closed on or before June 1, 1993. Attachment G. Lee's June 3, 1993, letter to the Commission neither stated that the loan had closed nor gave any hint as to when the closing would occur. The Commission heard nothing further from Lee until its late-filed notice of appearance in this proceeding.

7. On January 19, 1994, Lee and Saginaw Bay Broadcasting Corporation (SBBC), licensee of Station WMAX(AM), Bay City, Michigan, entered into a time brokerage agreement, whereby SBBC would provide programming for Station WTRX(AM). Motion for Summary Decision, Exhibit 2. On January 27, 1994, Lee filed a request for special temporary authority to resume broadcasting on Station WTRX(AM). Authority to operate was granted by letter dated January 28, 1994. Motion for Summary Decision, Exhibit 1, p. 15. Lee resumed broadcasting on Station WTRX(AM) on February 2, 1994. In the event the time brokerage agreement expires or is terminated for any reason, David Lee Scheurer, Lee's president and sole shareholder, has committed to invest personal funds to provide for the station's continued operation. Motion for Summary Decision, Exhibit 4.

CONCLUSIONS

8. Section 1.251 of the Commission's Rules provides for summary decision where there is no genuine issue of material fact for determination at hearing. *New Broadcasting Corp.*, 44 FCC 2d 386 (1973). A request for summary decision requires a showing that "the truth is clear," that "the basic facts are undisputed," and that "the parties are not in disagreement regarding material factual inferences that may be properly drawn from such facts." *Big Country Radio, Inc.*, 50 FCC 2d 967 (1975). The Presiding Judge agrees with the parties that there is no genuine dispute as to any material fact and that disposition by summary decision is appropriate.

9. Issue (a) seeks to determine whether Lee has the capacity and intent to resume broadcast operations. Since the HDO's release, WTRX(AM) has commenced regular broadcast operations. WTRX(AM) is currently operating pursuant to the terms of its Time Brokerage Agreement. The Agreement is for a term of one year with SBBC having the option to renew the Agreement for up to two additional one year terms. David Lee Schuehrer, President and sole shareholder of Lee is committed to keeping WTRX(AM) on the air. Should SBBC fail to renew the Agreement for an additional term or not perform pursuant to the terms of the existing Agreement, Schuehrer has committed to personally finance the continue operation of the station. Considering that WTRX(AM) is currently on the air and appears likely to remain so, issue (a) is resolved in Lee's favor.

10. Issue (b) calls for a determination whether Lee violated Sections 73.1740 and/or 73.1750 of the Commission's Rules. With respect to the latter Rule, Section 73.1750 requires that a licensee notify the Commission of its intent to permanently discontinue operation. The evidence makes clear that Lee never intended a permanent discontinuance of operations of WTRX(AM). Accordingly, Lee did not violate Section 73.1750.

11. Section 73.1740 of the Commision's Rules prescribes minimum operating schedules for commercial broadcast licensees. Among other things, the rule requires that, if a licensee is going to keep its station off the air for more than 30 days, it must obtain authorization from the Commission to do so. Section 73.1740(a)(4). Commission authority to operate less than the minimum required by Section 73.1740 is conferred by a grant of special temporary authority pursuant to Section 73.1635 of the Commission's Rules.

12. As noted, between August 20, 1990 and the issuance of the HDO, Station WTRX(AM) was off the air. Prior to April 29, 1993, the Commission had granted Station WTRX(AM) authority to remain silent. However, on April 30, 1993, the Commission notified Lee that its April 13, 1993, request for continued authority not to operate Station WTRX(AM) was insufficient to justify an extension of special temporary authority to remain silent. The Commission gave Lee a deadline of June 1, 1993, to submit any further request and informed Lee what such a request must include. However, Lee's June 3, 1993, letter was neither timely nor responsive. Under the circumstances, Lee had no valid reason for believing that Station WTRX(AM) had continued authority to remain silent or that its request for such authority would be granted *nunc pro tunc*. Hence, Lee's reliance on 5 U.S.C. Section 558(c)(2) is misplaced. In this regard, Lee did not lose its license. Rather, it simply did not receive a grant of a request for special temporary authority to remain silent. See Section 73.1635 of the Commission's Rules. By its very nature such authority is special and temporary. It does not confer upon a licensee the rights attendant to a permit or license and may be cancelled without prior notice or right to hearing. See Section 73.1635(b). In short, absent an express declaration by the Commission that Lee had continued authority not to resume broadcast operations, it had no such authority. Moreover, Lee's letters of April 13, 1993, and June 3, 1993, did not confer upon Lee authority to keep Station WTRX(AM) off the air nor did they revive any authority which had been previously granted but had since expired. Accordingly, Lee violated Section 73.1740, of the Commission's Rules.

13. In summary, issue (a) has been resolved in favor of Lee. With respect to issue (b), Lee did not violate Section 73.1750 of the Rules. As discussed, *supra*, Lee did violate Section 73.1740 of the Rules. While a sanction is called for, the Presiding Judge agrees with the Bureau that the imposition of a forfeiture would be counter-productive since Lee's financial condition contributed to its prolonged silence. As suggested by the Bureau, the public interest would be better served by a short term renewal of Lee's license. The Bureau's recommendation that renewal of Lee's license should be for a period ending on October 1, 1995, one year before the term would ordinarily end, is adopted.

Accordingly, IT IS ORDERED, That the Countermotion For Summary Decision filed by the Mass Media Bureau on March 15, 1994 IS GRANTED; That the Motion For Summary Decision filed March 1, 1994 by David Lee Communications, Inc. IS DISMISSED as moot; and that the

application for renewal of license of David Lee Communications, Inc. IS GRANTED for a short term ending October 1, 1995.[3]

FEDERAL COMMUNICATIONS COMMISSION

Joseph Chachkin
Administrative Law Judge
Federal Communications Commission

[3] In the event exceptions are not filed within 30 days after the release of this Summary Decision, and the Commission does not review the case on its own motion, this Summary Decision shall become effective 50 days after its public release, pursuant to 47 C.F.R. 1276(d).

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

ACC LONG DISTANCE CORPORATION,
Complainant,

v.

NEW YORK TELEPHONE COMPANY
Defendant,
File No. E-93-054

and

ALLNET COMMUNICATION SERVICES, INC.,
Complainant,

v.

THE BELLSOUTH TELEPHONE COMPANIES,
CINCINNATI BELL TELEPHONE COMPANY, and
MOUNTAIN STATES TELEPHONE AND TELEGRAPH COMPANY,
NORTHWESTERN BELL TELEPHONE COMPANY,
PACIFIC NORTHWEST TELEPHONE COMPANY,
Defendants.
File No. E-93-024
File No. E-93-025
File No. E-93-026

MEMORANDUM OPINION AND ORDER

Adopted: March 22, 1994; Released: April 1, 1994

By the Commission:

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I. INTRODUCTION

1. In this Memorandum Opinion and Order we find that the complainants in these consolidated Section 208 proceedings[1] have met their burden of establishing that the defendant local exchange carriers (LECs) have violated Section 201(b) of the Communications Act of 1934, as amended, (the "Act"),[2] by earning in excess of the rate of return for interstate access services prescribed by the Commission for the period January 1, 1989 through December 31, 1990. In addition, we award monetary damages, plus interest computed at the relevant Internal Revenue Service (IRS) rate compounded daily, to those complainants who have successfully shown that they incurred actual damages as a consequence of the defendants' violations. We also find that Allnet has failed to establish that the defendants BellSouth or CBT violated Sections 201(b) and 202(a) of the Act by failing to provide Allnet with dial-1 intraLATA interstate access or that BellSouth and CBT are required to assess non-premium access rates.

II. RATE OF RETURN ISSUES

A. Background

2. In 1992, the complainants here filed complaints alleging, *inter alia*, violations of the Commission's rate of return prescription for the January 1, 1989 through De-

[1] The complainants, the defendants, and the acronyms used to identify them in this Order are identified in Appendix A. Due to the similarity of the issues and arguments raised by the various parties, the proceedings have been consolidated for disposition.

[2] 47 U.S.C. § 201(b). This Section provides, in pertinent part, that "[a]ll charges, practices, classifications, and regulations for and in connection with ... communication service, shall be just and reasonable, and any such charge, practice, classification, or regulation that is unjust or unreasonable is hereby declared to be unlawful."

cember 31, 1990 monitoring period by the defendants.[3] After the completion of discovery, most of the parties filed briefs and reply briefs.[4] The issues presented in these consolidated complaint proceedings are virtually identical to those presented by the complainant in *MCI Telecommunication Corporation v. Pacific Northwest Bell Telephone Co.*[5] In that proceeding, we held that LEC rates that produced earnings in excess of a Commission prescription were unjust and unreasonable within the meaning of Section 201(b) of the Act. We also held that a complainant/customer is entitled to recover damages to the extent that it can show that it suffered actual damage as a consequence of such violations. Subsequently, in the damages phase of the proceeding, we held that MCI had properly shown that it had been harmed by paying the defendants' rates that produced the excessive earnings. We awarded the complainant monetary damages, plus interest computed at the IRS rate.[6]

B. Discussion

1. Liability For Damages

a. Contentions of the Parties

3. The complainants allege[7] that the rates they paid for certain of the defendants' interstate access services during the period from January 1, 1989 through December 31, 1990 were unjust and unreasonable in violation of Section 201(b) of the Act. The complainants support their allegations with evidence taken from reports filed with the Commission by the defendants for the two-year period at issue that show that the defendants achieved earnings in excess of the Commission's prescribed rate of return in one or more of the three interstate access categories established for the purpose of enforcing that rate of return prescription.[8]

4. The complainants request that the Commission declare that the defendants' charges for the period from January 1, 1989 through December 31, 1990 are in violation of the rate of return prescription and Section 201(b) of the Act and order the defendants to pay damages to the complainants equal to the difference between the amount actually paid by the complainants for interstate access service during the period and the amount that the complainants would have paid if the defendants' charges earned no more than the maximum allowable rate of return, plus interest.

5. The defendants advance a number of arguments to support their claims that they cannot be held liable for damages based solely on the fact that their rates produced earnings in excess of the Commission's prescribed rate of return. The defendants first argue that the complainants have failed to state a cause of action under Section 208 of the Act. The defendants contend that earning in excess of a rate of return prescription is not a violation of the Act or any valid Commission rule or order;[9] and most argue that even if such action could be considered a violation, it could occur only if the return was exceeded by the company "overall."[10]

6. To bolster this argument, the majority of the defendants argue that the complaints are barred by the D.C. Circuit's decision in *American Telephone & Telegraph Co. v. FCC*[11] and a later decision by the Sixth Circuit in *Ohio Bell Telephone Co. v. FCC*.[12] These defendants contend that

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[3] All the defendants filed answers, and several filed motions to dismiss. BellSouth filed a motion to amend its answer on April 7, 1993 that was unopposed. In the interest of compiling a complete record we will accept BellSouth's motion for filing.

[4] USWC did not submit an initial brief but did file a reply brief. Allnet's briefs (Br.) and reply briefs (RBr.) will be indicated by file number (*e.g.*, Allnet Br., File No. E-93-024). In addition to filing its own briefs, in each proceeding Allnet incorporated by reference the brief on damages filed by MCI Telecommunications Corporation in MCI Telecommunications Corporation v. Pacific Bell Telephone Company *et al.*, File Nos. E-88-46S *et al.*, filed on July 6, 1992. This brief will be indicated as MCI 1992 Br. ACC's and the defendants' briefs (Br.) and reply briefs (RBr.) will be indicated by party (*e.g.*, CBT Br.). USWC's reply brief also incorporates by reference the reply brief on damages it filed in MCI Telecommunications Corporation v. Pacific Northwest Bell *et al.*, File Nos. E-88-44S *et al.*, filed on July 13, 1992. This reply brief will be noted as USWC 1992 RBr.

[5] 5 FCC Rcd 216 (1990) (*MCI Liability Order*), *recon. denied*, 5 FCC Rcd 3463 (1990) (*MCI Reconsideration Order*) (jointly *"MCI Liability Orders"*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam). *See also*, American Tel. and Tel. Co. v. Northwestern Bell Tel. Co., 5 FCC Rcd 143 (1990) (*AT&T Liability Order*), *appeal dismissed sub nom. Mountain States Tel. and Tel. Co. v. FCC*, 951 F.2d 1259 (10th Cir. 1991) (per curiam).

[6] MCI Telecommunications Corp. v. Pacific Bell Tel. Co., 8 FCC Rcd 1517 (1993) (*MCI Damages Order*), *appeals docketed sub nom. MCI Telecommunications Corp. v. FCC*, No. 93-1166 *et al.* (D.C. Cir. Feb. 18, 1993). *See also* AT&T Communications v. Northwestern Bell Tel. Co., 8 FCC Rcd 1014 (1993) (*AT&T Damages Order*), *appeal docketed sub nom. U S WEST Communications, Inc. v. FCC*, No. 93-1223 (D.C. Cir. Mar. 22, 1993).

[7] The arguments and claims made by the various complainants and defendants are, for the most part, identical in their essentials. For convenience and clarity, we refer to the complainants' arguments or the defendants' arguments, as the case may be, as if they were part of the same pleadings. To the extent that individual complainants or defendants make unique or separate arguments, we address them accordingly.

[8] The interstate access service categories are special access, common line, and switched traffic sensitive. *See* 47 C.F.R. § 65.702. The rates of return reported for the various defendants on their Forms 492 for the 1989-1990 monitoring period are set forth in Appendix B.

[9] CBT argues that the Commission has not yet promulgated new refund rules as suggested by the court in *AT&T v. FCC*, 836 F.2d at 1392, that would ensure that enforcement of rates of return maintains the appropriate balance between the interests of consumers and investors. CBT Br. at 5. NYT goes further arguing that in the absence of action by the Commission on the court's remand in *AT&T v. FCC*, there is no valid rule requiring refunds of earnings above either the category or interstate rates of return. NYT Br. at 5. BellSouth also argues that there can be no liability based on a violation of Section 65.700 of the Commission's rules because Section 65.700 no longer exists.

[10] *See, e.g.*, NYT Br. at 10.

[11] 836 F.2d 1386 (D.C. Cir. 1988) (*AT&T v. FCC*).

[12] 949 F.2d 864 (6th Cir. 1991) (*Ohio Bell*). In *AT&T v. FCC*, the court invalidated the Commission's procedure designed to enforce its rate of return prescriptions through the automatic refund of carrier overearnings to customers. In *Ohio Bell*, the court, relying on *AT&T v. FCC*, vacated a Commission order which had directed refunds of LEC earnings in excess of the authorized rate of return for the special access category over a period of years in the context of a strategic pricing investigation. *Ohio Bell*, 949 F.2d at 874. The Sixth Circuit placed considerable weight on the statement in *AT&T v. FCC* indicating that the Commission viewed its rate of return prescription as both floor and ceiling on carrier earnings. *Ohio Bell*, 949 F.2d at 878,

recasting what amounts to a "refund" as a "damage award" does not cure the deficiencies the court found with a procedure that effectively requires the automatic refund of carrier overearnings but does not permit carriers to recoup earning shortfalls. The majority of the defendants argue that consistent with *AT&T v. FCC*, the Commission must consider a carrier's overall earnings in determining whether a carrier's category earnings levels are in violation of the Act. Therefore, these defendants maintain that to the extent that their earnings for overall interstate access services did not exceed the allowed 12.25 percent, there can be no violation of the Act regardless of the earnings realized in individual access service categories. In addition, these defendants contend that the court's decision in *Ohio Bell*, issued after the release of the *MCI Liability Order*, reaffirms the proposition established in *AT&T v. FCC* that the Commission cannot entertain complaints for damages based on category-level interstate access overearnings. CBT maintains that these propositions are not confined to the Commission's ratemaking activities under Sections 204-205 of the Act but are equally applicable when the Commission decides private complaints for damages under Section 208 of the Act.

7. Some of the defendants next contend that the Commission has no authority to order a refund retroactively apart from Sections 204 and 205 of the Act.[13] NYT argues that under a court decision, *Illinois Bell Tel. Co. v. FCC*,[14] the Commission cannot order refunds unless it has first suspended rates under § 204.[15] CBT argues further that even if its rates were not actually prescribed, CBT was required to charge those rates under the filed rate doctrine.

b. Discussion

8. We have carefully examined the record before us and conclude that, for the most part, the defendants' arguments were fully considered and rejected in the *MCI Liability Orders*. The defendants have cited no facts and have made no arguments here that would warrant a different ruling.

9. *Failure to State a Cause of Action:* In the *MCI Liability Order*, we rejected identical claims made by the defendants there that earnings in excess of a prescribed rate of return do not establish a cause of action under the Act. We held that *AT&T v. FCC*, the principal case authority relied upon by the defendants, establishes no precedent that bars an individual complainant from seeking a remedy under Section 208 of the Act for damages based on a carrier's reported overearnings.[16] Specifically, we stated that:

> we are not persuaded by the defendants' claims that earning in excess of a prescribed rate of return does not violate that Act or, if it does, that the Commission *is required* to take a carrier's underearnings as well as its overearnings into account in determining whether a violation has occurred.
>
> * * * * * * *
>
> We find that a valid prescription bound the defendants to a maximum earnings limitation, and the defendants admit that they earned in excess of that amount during the period in question.[17]

We found further that *AT&T v. FCC* did not govern Section 208 complaint proceedings. The Commission has the authority to order a carrier to pay damages if a complainant meets the burden of establishing both a violation of the Act and the actual injury.[18]

10. In addition, we find unavailing the defendants' arguments that there are no longer any refund rules in effect upon which liability can be based. The rate of return prescription remained in effect during the 1989-1990 period. *AT&T v. FCC* simply remanded the enforcement provision of those rules. Furthermore, the instant complaints seek individual damages under Section 208 of the Act, not refunds under other sections of the Act, and must be dealt with on their merits.[19]

11. *AT&T v. FCC and Ohio Bell:* The defendants' claims that *AT&T v. FCC* and *Ohio Bell* compel us to dismiss the complaints have no merit. As we emphasized in the *MCI Liability Order* and reaffirmed in the *MCI Damages Order*, automatic refunds and refunds ordered under Section 204 of the Act are different from individual actions for damages under Section 208. Unlike the automatic refund mechanism in *AT&T v. FCC* or the refund procedure in *Ohio Bell*, both of which resulted from rulemaking proceedings initiated at the Commission's discretion, individual actions for damages under Section 208 are initiated by private parties seeking damages for injuries to themselves; those private parties have the burden of establishing both a viola-

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citing *AT&T v. FCC*, 836 F.2d at 1390. The Commission, however, has since clarified that it does not view a rate of return prescription as both a minimum and maximum:

> [o]ur accumulated experience with rate of return prescriptions, and our review of the cost of capital evidence in this proceeding, convince us that there is no such point. * * * We believe there is a substantial gap between an earnings level that is fully adequate to assure attraction of capital on favorable terms, and an earnings level which, if sustained over time, would be confiscatory.

Represcribing the Authorized Rate of Return for Interstate Services of Local Exchange Carriers, 5 FCC Rcd 7507, 7532 (1990); *petition for review denied sub nom. Illinois Bell Tel. Co. v. FCC*, 988 F.2d 1254 (D.C. Cir. 1993).

[13] *See, e.g.*, CBT Br. at 8.

[14] 966 F.2d 1478 (D.C. Cir. 1992) (*Illinois Bell*).

[15] *See* NYT Br. at 8.

[16] *MCI Liability Order*, 5 FCC Rcd at 222-23.

[17] *Id.* at 223 [emphasis in the original; footnote omitted].

[18] *Id.*

[19] We note the Commission has terminated CC No. Docket 84-800. *See* Authorized Rates of Return for the Interstate Services of AT&T Communications and Exchange Telephone Carriers, 7 FCC Rcd 5582 (1992). The only matters that were pending in that docket after the court's remand in *AT&T v. FCC* are being addressed in Amendment of Parts 65 and 69 of the Commission's Rules to Reform the Interstate Rate of Return Represcription and Enforcement Processes, CC Docket No. 92-133, Notice of Proposed Rulemaking and Order, 7 FCC Rcd 4688, 4700-2 (1992). While our determination here should not be construed to prejudge the issues and arguments presented by the parties to that proceeding, our action here is consistent with the proposals in that docket. *Id.*, 7 FCC Rcd at 4702, para. 98.

tion of the Act and actual injury.[20] The courts in *AT&T v. FCC* and *Ohio Bell* did not discuss private complaints for damages; they did not invalidate private actions for damages. Thus their holdings are not applicable to the different, separately authorized complaint procedure set forth in Sections 206-209. Accordingly, those decisions do not require us to depart from our holding in the *MCI Liability Order* that the defendants have violated the Communications Act by earning in excess of a valid rate of return prescription, thereby making their rates unjust and unreasonable under Section 201 of the Communications Act and themselves liable for damages to the extent a complainant/customer can establish that it was damaged as a result of the violation.[21]

12. *Defendants' Other Arguments.* We reject the defendants' claims that the decision in *Illinois Bell* somehow leaves the Commission only with Section 205 authority in the face of a violation of our rate of return prescription. As we explained in the *MCI Damages Order, Illinois Bell* addresses the Commission's authority under Section 204, not Section 208.[22] The defendants' claim that the *Illinois Bell* decision deprives the Commission of authority to award damages for violations of a valid rate of return prescription has no merit.

13. CBT's argument that the complaints are barred because the rates in effect during the period in question were prescribed by the Commission was discussed at length and rejected in the *MCI Liability Order* and requires no further discussion here.[23] CBT has raised no new issues or arguments that would persuade us to depart from our previous holdings.

2. Damages and Interest Claims

a. Damages

i. Contentions of the Parties

14. The complainants' damages claims rest primarily on the contention that the proper measure of damages incurred as a result of the defendants' rate of return prescription violations is the difference between the amounts the complainants actually paid the defendants for interstate access services during the January 1, 1989 through December 31, 1990 monitoring period and the amount they each would have paid if the defendants' rates produced earnings that did not exceed the Commission's prescription.[24] The damages amounts claimed by individual complainants from the various defendants based on this measure are set forth in Appendix C.

15. The defendants challenge the complainants' damages claims on a number of grounds, raising several arguments that were previously considered and rejected by the Commission in the *MCI Liability Order* and the *MCI Damages Order*. The defendants contend that by simply basing their damages claims on a calculation of their prorated share of each of the defendants' category-level overearnings, the complainants ask the Commission to award them damages in the same amounts they would have received under the automatic refund rule invalidated by the court in *AT&T v. FCC*.[25] The defendants maintain that such a result is expressly precluded by *AT&T v. FCC* as well as the court's decision in *Ohio Bell*.

16. The defendants next contend that, even if *AT&T v. FCC* and *Ohio Bell* do not preclude an award of damages, the complainants' damages claims still fail because the complaints do not establish a valid cause of action. According to the defendants, to pursue a damages claim, the complainants must first show that the defendants charged unjust and unreasonable rates for interstate access services during the period in question, not that the defendants' rates produced excessive returns in individual service categories.[26] Moreover, the defendants argue, Section 206 of the Act[27] requires the complainants to prove injury, causation, and the specific amount of damages sought, in addition to establishing a violation of the Act.[28] The defendants maintain that by simply referencing the defendants' earned rates of return for individual access service categories, the complainants have not only failed to allege any facts that would establish that the defendants' rates were unjust and unreasonable during the period in question but have also failed to show that they sustained actual damage as a result of those rates.[29]

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[20] *See MCI Liability Order*, 5 FCC Rcd at 222-23, para. 55.

[21] *Id.* at 226, para. 86.

[22] *See MCI Damages Order*, 8 FCC Rcd at 1524-25, para. 27.

[23] *See MCI Liability Order*, 5 FCC Rcd at 223-24.

[24] *See, e.g.*, ACC Br. at 7; MCI 1992 Br. at 5-6 citing *Louisville & Nashville R. Co. v. Sloss-Sheffield Steel & Iron Co.*, 269 U.S. 217 (1925); *Southern Pacific Co. v. Darnell-Taenzer Co.*, 245 U.S. 531 (1918).

[25] *See, e.g.*, CBT Br. at 7. The defendants contend that *Ohio Bell* makes clear that it was the end result of the automatic refund mechanism, not the mechanism itself, that was unlawful.

[26] *See, e.g.*, CBT Br. at 11-12.

[27] *See* 47 U.S.C. § 206.

[28] *See, e.g.*, NYT Br. at 10-11.

[29] *See, e.g.*, NYT Br. at 10-11; CBT Br. at 10-12. The defendants contend that the principle that the complainants must still prove they were damaged and in what amount was established by the Supreme Court in *Southern Ry. Co. v. Seaboard Allied Milling Corp.*, 442 U.S. 444, 454-55 (1979) (*Seaboard*), in construing relevant sections of the Interstate Commerce Act (the IC Act). Section 204 of the Act parallels Section 15(8)(a) of the IC Act and Section 208 of the Act parallels Section 13(1) of the IC Act. In *Seaboard*, the Court stated:

> [O]ur sole concern is the Commission's decision not to investigate under § 15(8)(a), a decision that has only two final consequences. First, the burden of proof with regard to *reasonableness* is placed on the shipper under § 13(1) rather than on the carrier, who would have borne it in a § 15(8)(a) proceeding. (With respect to all other aspects of lawfulness, however, the burden is borne by the shipper in both proceedings.) Second, the shipper's relief, if unlawfulness is proved, is limited under § 13(1) to actual damages rather than the full refund of overcharges available under § 15(8)(a). The

defendants contend that this ruling has been found applicable to proceedings under the Act. *See Aeronautical Radio, Inc. v. FCC*, 642 F.2d 1221, 1235 n.34. Here too, as we determined in the *MCI Damages Order*, the defendants' reliance on case precedent is misplaced. *MCI Damages Order*, 8 FCC Rcd at 1522 n.60.

17. USWC also contends that an award of damages to the complainants based on carrier overearnings is inappropriate for equitable and policy reasons.[30] In addition, USWC argues that an award of damages to Allnet would reward Allnet for engaging in unlawful conduct, *i.e.*, the provision of untariffed interstate access service in violation of Section 203 of the Act.[31]

18. Some defendants further contend that the complainants' claims for damages are flawed because the complainants would receive windfalls if they have passed the "overcharges" on to their customers and are now awarded damages.[32] These defendants argue that had their access charges to the complainants been lower in 1989-1990, it is almost certain that the complainants' rates to their customers would have been lower.[33]

19. The majority of the defendants argue that even if the Commission determines that damages are lawful and appropriate, any damages award to the complainants based on overearnings must be reduced to the extent that the complainants purchased services from the defendants in other access categories that produced underearnings.[34] The defendants argue that without taking into account substantial benefits realized by the complainants by purchasing services at unreasonably low rates, the complainants would receive a windfall profit that would be inconsistent with sound principles of equity. BellSouth further contends that because it underearned in some categories, its maximum liability to all carriers should be limited.[35] According to BellSouth, because some carriers purchased a mix of access services that included more of the categories where BellSouth underearned, BellSouth will not adequately be able to recover those underearnings or offsets unless its total liability is limited and the complainants are allowed to recover only their share of that total liability.[36]

20. In responsive pleadings, the complainants argue that the defendants' threshold arguments regarding the effect of the court's ruling in *AT&T v. FCC* have largely been rejected or precluded by the *AT&T Liability Order*. The complainants claim that any so-called similarities between their damages complaints and the automatic refund mechanism invalidated by the court do not transform the private complaint remedy under Section 208 of the Act into a public enforcement refund remedy subject to entirely different standards and requirements as alleged by the defendants.[37] The complainants add that the defendants' claims that they have failed to allege and prove violations of the Act and actual damage as a result of those violations are unfounded. The complainants maintain that they have successfully shown injury and causation arising from their payment of excessive rates for services purchased from the defendants during the relevant period.[38] The complainants assert that their damages are the excessive charges that they paid. Finally, ACC contends that the defendants' offset claims should be rejected because any reduction in the full amount to which ACC is legally entitled would be inconsistent with the Commission's rate of return prescription.[39]

ii. Discussion

21. *AT&T v. FCC, Ohio Bell, and Illinois Bell:* The defendants' claims that the holdings in *AT&T v. FCC, Ohio Bell,* and *Illinois Bell* control these proceedings and bar awards of damages based on earnings in excess of prescribed rate of return were previously raised by several of these same defendants and discussed at length in the *MCI Liability Order* and the *MCI Damages Order* (jointly "*MCI Orders*").[40] We find these arguments to be without merit for the reasons stated in the *MCI Orders* and they require no further discussion here.

22. *Section 201(b) of the Act:* The defendants' contentions that the complainants' damages claims must be dismissed because the complainants have failed to prove that the defendants' rates were unjust and unreasonable within the meaning of Section 201(b) of the Act have no merit. In addressing liability above, we held that the complainants met their burden of establishing that the defendants violated our rate of return prescription thereby making their rates unlawful under Section 201(b) of the Act.[41]

23. Also without merit is the defendants' claim that even if the complainants have shown that the defendants' rates were unjust and unreasonable, their damages claims must still fail because judicial precedent compels the complainants to establish what a just and reasonable rate would have been as a prerequisite to recovering damages. This argument was previously considered and rejected in the *MCI Damages Order*.[42] The complainants have shown that they purchased services from the defendants at rates that produced earnings over and above the defendants' prescribed

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30 *See, e.g.*, USWC 1992 RBr. at 4-5.

31 USWC RBr. 2.

32 *See, e.g.*, CBT Br. at 15.

33 *See* NYT Br. at 12.

34 BellSouth Br. at 7-8; CBT Br. at 12-14; NYT Br. at 12 n.27.

35 BellSouth Br. at 6-7.

36 BellSouth also contends that revenue figures taken from its Form 492 should be modified for the purposes of calculating market share and, subsequently damages, by subtracting end user subscriber line charge revenue. BellSouth reasons that those revenues result from a prescribed charge which is not paid by the interexchange carriers (IXCs) and, therefore, are not relevant in calculating an IXC's market share. We reject BellSouth's contention. BellSouth's methodology is inconsistent with the methodology adopted by the Commission for calculating damages resulting from earnings in excess of the prescribed rate of return and BellSouth has not provided new information or arguments that would persuade us to depart from our methodology. The Commission established a rate of return prescription for specific categories which is calculated based on all of the revenues within the category and the rate base for the category. To exclude part of the revenues for a category would invalidate the rate of return calculation.

37 *See, e.g.*, ACC RBr. at 4-7.

38 *See, e.g.*, Allnet RBr., File No. E-93-025, at 5.

39 ACC RBr. at 7-8.

40 *See MCI Liability Order*, 5 FCC Rcd at 221-23; *MCI Damages Order*, 8 FCC Rcd at 1524-25. Similarly, *New England Tel. and Tel. Co. v. FCC*, 826 F.2d 1101 (D.C. Cir. 1987) *cert. denied*, 490 U.S. 1039 (1989), does not bar an award of damages in these proceedings. *See MCI Liability Order*, 5 FCC Rcd 222-23.

41 In the *MCI Liability Order*, we held that the complainant could prove that the defendants' rates were unjust and unreasonable by proving that the defendants violated our rate of return prescription. *See MCI Liability Order*, 5 FCC Rcd at 226.

42 *See MCI Damages Order*, 8 FCC Rcd at 1525, para. 29. We emphasized in that decision the Commission's authority to prescribe and enforce carriers' rates of return. We also pointed out that the issue in these rate of return complaint proceedings is not whether individual rates are unlawful, but whether cumulative rates that produced earnings over and above a prescribed

levels. The defendants, faced with the prospect of damages for violations of a binding rate of return prescription, cannot so readily disavow the substantial flexibility afforded carriers to achieve their authorized rate of return. In effect, the defendants would have us require the complainants to do what the defendants were neither required nor apparently able to do, that is, establish the precise rates required to bring the defendants' earnings within authorized levels for each of their interstate access service categories. The defendants ask too much. Although the Commission's rate of return prescription afforded the defendants considerable leeway in setting their rates, it also bound the defendants to a maximum earnings limitation. We previously determined in the *MCI Liability Order* that a violation of such a prescription constitutes a violation of the Act for which damages may lie. It is therefore appropriate and consistent with the Commission's rate of return regulatory scheme to inquire as to earnings in excess of prescribed levels as a starting point for assessing the complainants' damages claims.

24. *Damages and Offsets:* The defendants' arguments are devoted primarily to attempting to persuade the Commission that the complainants' damages claims are really claims for restitution or refunds governed by equitable or public policy considerations. These considerations, according to the defendants, militate against any award of damages to the complainants based on excessive earnings. The defendants argue, in effect, that the damages the complainants seek are equivalent to refunds that would have been required under the refund mechanism invalidated by the court in *AT&T v. FCC*. We do not agree. We are concerned here with determining whether a particular customer, which has availed itself of a statutory complaint remedy under Title II of the Act, has sustained any measurable damage that can be traced to the defendants' violations of the Act. Although a damages award under Section 208 of the Act might well be equal or substantially similar to a refund ordered under Section 204 of the Act,[43] this does not transform a private complaint action into a public enforcement proceeding subject to broad public interest considerations.

25. Consistent with our decisions in the *MCI Damages Order* and *AT&T Damages Order*, we find the defendants' arguments with respect to "passing-on" to be equally unavailing. In rejecting this same argument, we said, "[w]hether [complainant] passed on the overcharges or absorbed them does not alter the fact that the defendants overcharged [complainant] in violation of a binding rate of return prescription and must answer for such violations."[44] The issue is not what the complainants have done in response to paying excessive rates, but whether the complainants have been damaged as a result of these excessive rates.

26. We also reject the defendants' other equitable arguments regarding impermissible windfall profits to the complainants if damages are awarded. The defendants' arguments in this regard, along with the numerous Commission and judicial precedents relied upon by the parties, were addressed in detail in the *MCI Damages Order*[45] and require no further discussion here. In addition, USWC's argument that an award of damages would reward Allnet for unlawfully providing untariffed interstate access services is unavailing. The question here is whether Allnet was damaged by USWC, not whether Allnet offered allegedly untariffed services.

27. We do find, however, that certain of the defendants have made persuasive claims for offsets based on the complainants' purchases of access services in categories in which the defendants realized earning shortfalls during the period in question. At the outset, we note that we have previously rejected the defendants' claims that the Commission is required to take into account a carrier's interstate access underearnings as well as its overearnings in determining whether a violation of the Act has occurred sufficient to sustain a complaint of damages under Section 208 of the Act.[46] We also note, however, that we have similarly rejected the notion that we lack discretion under Section 208 to consider a complainant's overall purchase of interstate access services from a defendant during a particular monitoring period in assessing the damage or injury to that complainant.[47] We continue to believe, as courts have made clear, that carriers assume the risk of both losses for services they underprice and the prospect of returning amounts realized through rates that are unjustly or unreasonably high.[48] We also maintain our view that a carrier may properly be required to make whole those who have been injured by unlawful rates and practices without regard to whether the carrier has achieved its authorized rate of return overall.[49] Nevertheless, we believe it appropriate for purposes of assessing the complainants' damages claims to examine the complainants' overall purchase of interstate access services from the respective defendants during the monitoring period covered by the complaints.

28. Significantly, the complainants do not dispute that, in their purchases of interstate access services from the defendants, they benefitted substantially from the defendants' rates that produced underearnings in one or more access service categories. Thus, while we view it as a reasonable starting point to look at the difference between the amounts the complainants paid for the defendants' access services on a category basis and the amounts they would

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rate of return are unjust and unreasonable. Accordingly, we held that the Bureau had properly determined that it is appropriate, in measuring the damage caused by the defendants' rate of return violations, to look at the difference between the amount the complainants paid for the defendants' interstate access services and the amount they would have paid if the defendants had charged rates that produced returns within the Commission's prescribed levels. *See also MCI Liability Order*, 5 FCC Rcd at 222-23 (discussing the Commission's authority under the Act to prescribe and enforce common carriers' rates of return).

[43] *See Seaboard*, 442 U.S. 444, 455 n.8:

> If a shipper proves a rate is unreasonable and that he was damaged in the full amount he was overcharged, the outcome of a § 13(1) [parallelh)*with § 208 of the Act] proceeding will be no different than that of a § 15(8)(a) [parallel with § 204 of the Act] proceeding in which the carrier fails to establish the reasonableness of the rate.

[44] *MCI Damages Order*, 8 FCC Rcd at 1526, para. 31. *See also AT&T Damages Order*, 8 FCC Rcd at 1020, para. 21.

[45] 8 FCC Rcd at 1526, para. 33.

[46] *MCI Liability Order*, 5 FCC Rcd at 223.

[47] *MCI Damages Order*, 8 FCC Rcd at 1527, para. 35.

[48] *See MCI Liability Order*, 5 FCC Rcd at 223.

[49] *Id.*

have paid if the defendants had earned at the prescribed level for the relevant category, we find it also reasonable to offset payments by the complainants that contributed to the defendants' excessive earnings to the extent that it can be shown that the complainants benefitted from the defendants' underearnings during the relevant period.

29. In the *MCI Damages Order*, we rejected claims that allowing offsets would somehow repeal our rate of return prescription on a category basis.[50] We emphasized that the issue presented by these complaints and contested by the defendants is the extent to which the complainants have been damaged as a consequence of the defendants' violations of a binding rate of return prescription and that the focus of the complaints is not the defendants' individual interstate access rates *per se*, but the excessive earnings produced by those rates and their effect on the complainants.[51] The complainants have provided no new information or arguments that would persuade us to depart from our holdings. Moreover, as we emphasized in the *MCI Damages Order*, we view offsets in the complaint context as appropriate only in relation to a particular complainant's purchase of access service from a defendant carrier. A defendant would not, for example, be able to rely on undercharges to a separate customer or underearnings in general to offset a damages claim based on the measures adopted here. In particular, a complainant that took service in only one access service category that overearned would not have received the benefit of a defendant's underearnings in access categories from which service was not taken. Therefore, we reject BellSouth's contention that its maximum liability to all interstate access customers must be considered in deriving damages amounts. Under its damages methodology, BellSouth calculated the net amount of its over and underearnings to get an "aggregate" dollar amount of overearnings which it then apportioned among all of its interstate access customers, including the complainant. This methodology is apparently designed to limit the carrier's damages liability to any particular customer so that it will still earn its allowed rate of return in all access categories.[52] We find this methodology to be flawed because it improperly places the burden of recouping BellSouth's underearnings on those customers who file complaints. We have held that the carriers to which the rate of return prescription applies bear the risk of underearnings.[53]

30. Based upon our decision regarding the computation of damages, we award damages to the complainants as specified in Appendix C to this Memorandum Opinion and Order. In reaching the amounts specified in Appendix C, we have reviewed the damages calculations provided by both the complainants and the defendants and made adjustments to these calculations as explained in Appendix C. In addition, we accept the defendants' claims for offsets to the extent that the record shows that the complainants purchased access services from the defendants during the period in question at rates that produced earnings below the Commission's prescribed levels. CBT has argued that Allnet's damages should be offset by $185,000, the amount it claims Allnet wrongfully withheld for interstate access purchased from CBT during the 1989-1990 time period.[54] In response, Allnet explains that CBT won a federal district court collection action for the full $185,000, plus interest, which Allnet states has been placed in an escrow account with the court clerk pending the outcome of Allnet's appeal in that case.[55] In a similar case, we adjusted the amount of damages owed by the Bell Atlantic Telephone Companies (Bell Atlantic) to Allnet for interstate access overearnings based on our finding that Allnet had engaged in self-help and withheld monies that it claimed Bell Atlantic owed as a result of Allnet's purchase of interstate access services.[56] In the instant case, it appears that the disputed amount has been placed in escrow pending the result of Allnet's appeal of the district court ruling. Should the court sustain Allnet's self-help action, it is our expectation that Allnet's damages will be adjusted accordingly. We address the complainants' claims for interest on the damages amounts in the section below.

b. Interest and Attorney's Fees

i. Contentions of the Parties

31. Allnet claims that interest should be awarded on the damages it suffered and should be calculated at the rate provided for in the defendants' tariffs.[57] ACC contends that it should be awarded interest on damages calculated at the IRS rate used for tax overpayments compounded daily.[58]

32. The defendants do not contest the Commission's authority to award interest in a Section 208 common carrier complaint proceeding. USWC and BellSouth do, however, dispute Allnet's use of the interest rates specified in their tariffs to be used in refund disputes.

ii. Discussion

33. *Interest:* Recently the Commission adopted a policy of awarding interest computed on a daily compounded basis at the IRS rate for tax overpayments.[59] Allnet has provided no new arguments that would compel us to alter our previous determination and we therefore reject Allnet's claim that the interest rate to be used in refund disputes should be that specified in the defendants' tariffs. Therefore, we find that interest on the damages awarded here from each of the defendants should be computed at the IRS rate for tax refunds, compounded daily, from January

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[50] *MCI Damages Order*, 8 FCC Rcd at 1527, para. 36.

[51] *Id.* at 1527-28, para. 39.

[52] BellSouth's proposed methodology appears to presume that it will be able to recoup underearnings only to the extent that it can establish offsets to the complainants' damages claims.

[53] *MCI Damages Order*, 8 FCC Rcd at 1528, para. 39.

[54] CBT Br. at 14-15.

[55] Allnet RBr., File No. E-93-025, at n.6 and Allnet Opposition to Defendant's Motion to Compel, File No. E-93-025, at n.1, citing *Cincinnati Bell Tele. Co. v. Allnet Communications Services, Inc.*, 810 F. Supp. 217 (S.D. Ohio 1992), *appeals filed*, Nos. 92-4044, 92-4170 (6th Cir. Oct. 2, 1992).

[56] Allnet Communications Services, Inc. v. The Bell Atlantic Telephone Companies, 8 FCC Rcd 5438 (1993).

[57] *See* Allnet Br., File No. E-93-024 at 4 & n.3; Allnet Br., File No. E-93-026 at 4 & n.5.

[58] ACC Br. at 14.

[59] *See* Competitive Telecommunications Ass'n v. The Chesapeake and Potomac Tel. Cos., 8 FCC Rcd 5550, 5553, at para. 15 (1993) and Section 208 Complaints Alleging Violations of the Commission's Rate of Return Prescription for the 1987-1988 Monitoring Period, 8 FCC Rcd 5485, 5495 at para. 42 (1993).

1, 1991, the day after the relevant 1989-1990 rate of return monitoring period ended, until the date full payment is made to each of the complainants.[60]

34. *Attorneys' Fees:* In its complaint, Allnet seeks to recover attorneys' fees and costs in addition to any damage award. It has long been established that the Commission lacks the authority to award attorney's fees or costs.[61]

III. EQUAL ACCESS

A. Contentions of the Parties

35. The second count of Allnet's complaint alleges that the defendants'[62] failure to provide intraLATA[63] interstate presubscription, or "dial-1" intraLATA interstate access to other carriers, including to the complainant, constitutes a denial of equal access in violation of the Commission's access rules. Allnet asserts that the defendants' customers are able to access the defendants' intraLATA interstate services on a dial-1 basis while Allnet customers in the defendants' serving territory must dial a 10XXX prefix, or access code, in addition to dialing the called number to access Allnet's intraLATA services.[64] According to Allnet, the Commission has found that providing dial-1 intraLATA interstate access is a critical component of equal access.[65] Allnet further alleges that the defendants' provision of dial-1 intraLATA interstate access to themselves, while denying such access to competing carriers like Allnet, constitutes unreasonable discrimination, in violation of Section 202(a) of the Act.[66] Further, Allnet states that the Commission's rules require that non-premium access charges be assessed on those carriers who are denied access equal to that provided to the Message Telephone Service/Wide Area Telephone System (MTS/WATS) provider.[67] Thus, Allnet reasons, because its access is not equal to that of the defendants as the MTS/WATS providers, Allnet should not be assessed full premium access charges. Allnet argues that the defendants assess full premium access charges on Allnet in end offices where the defendants have failed to provide dial-1 interstate intraLATA access, which violates Section 69.205 of the Commission's access charge rules.[68]

36. In response, the defendants argue that the Commission has rejected identical contentions made by Allnet in earlier complaint proceedings and that the rationale underpinning those decisions is applicable here.[69] First, the defendants contend that their companies do not provide dial-1, 1+, or presubscription for access minutes used for intraLATA interstate services because the Commission and the court overseeing the Modification of Final Judgment (MFJ) do not require dialing parity for intraLATA interstate calls.[70] The defendants do not contest their requirement to provide dial-1 access, or presubscription, to a designated IXC for interLATA interstate calls, but rather, they contend that the Commission has not ordered the BOCs to provide dial-1 access, or presubscription, for intraLATA interstate traffic.[71] Moreover, the defendants contend that the court overseeing the MFJ has specifically rejected similar requests by IXCs that equal access be construed to require the BOCs to provide presubscription for intraLATA interstate access.[72]

37. In addition, the defendants argue that the Commission has held that failure to provide dial-1 access for intraLATA interstate services does not constitute unreasonable discrimination under Section 202 of the Act.[73] BellSouth contends that its interstate intraLATA service is not functionally equivalent to the interstate interLATA service provided to IXCs. BellSouth further argues that even if the services were found to be "like," the disparity in service provision is not unreasonable in violation of Section 202.[74] CBT argues that the issue is not whether the LECs have discriminated against IXCs by failing to provide them with the same dial-1 interstate intraLATA service that the LECs provide for themselves, but whether such discrimination is reasonable. According to CBT, the Commission has already decided that such discrimination is reasonable because of "the impracticality and cost of implementing the requested changes."[75]

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[60] The applicable IRS rates are set forth in Appendix D.

[61] Comark Cable Fund III v. Northwestern Indiana Tel. Co., 100 FCC 2d 1244, 1257 n.51 (1985), *remanded on other grounds*, 824 F.2d 1205 (D.C. Cir. 1987), *review denied*, 872 F.2d 465 (D.C. Cir. 1989), *cert. denied*, 493 U.S. 1035 (1990); Stroud v. Western Union, 70 FCC 2d 506, 511, 567 (1978).

[62] The term defendants here refers to BellSouth and CBT as the only defendants against whom Allnet lodged this charge.

[63] Local Access and Transport Area, a term created by the Modification of Final Judgment which established the Bell Operating Companies (BOCs), describes a geographically based area within which a BOC may provide telecommunications service.

[64] Allnet Reply to Answer, File No. E-93-024, at 3-4.

[65] Allnet Br., File No. E-93-024, at 4.

[66] 47 U.S.C. § 202(a).

[67] *See, e.g.*, Allnet Br., File No. E-93-025, at 4-5. Allnet also contends that the defendants' tariffs allow premium charges to be applied only where equal access or Feature Group D (FGD) is provided and those tariffs do not limit equal access to only interLATA interstate calls. Allnet Br., File No. E-93-024, at 5 n.6.

[68] 47 C.F.R. § 69.205.

[69] *See, e.g.*, BellSouth Br. at 9 n.6, citing Allnet Communication Services, Inc. v. U S West, Inc., 8 FCC Rcd 3017 (1993) (*USWC Damages Order), recon. denied*, 9 FCC Rcd 977 (1993).

[70] *See, e.g.*, BellSouth Br. at 9-10.

[71] *See id.*

[72] *See id.* at 10, citing *United States v. Western Electric Co.*, 569 F. Supp. 990, 1108 (D.D.C. 1983).

[73] *See, e.g.*, CBT Br. at 16.

[74] BellSouth Br. at 11-14. In support of its contention that any disparity in its provision of interstate intraLATA dial-1 access is not unreasonable, BellSouth asserts that the significant technical and administrative costs that would be incurred to implement dial-1 service cannot be justified given the relatively low volume of interstate intraLATA traffic. Specifically, BellSouth estimates that it would cost in excess of $59,000,000 to provide dial-1 service in its region and that provision of dial-1 access would add to the complexity of presubscription and could be responsible for more customer complaints. *Id.* at 13.

[75] CBT Br. at 16-17. In support of the reasonableness of the discrimination, CBT states that it would have to upgrade at least half of its 48 switches with software that is not scheduled to be available until mid-1995 at the earliest. CBT also states that given Allnet's current market share of interstate interLATA traffic, CBT estimates that Allnet would only generate approximately $55,000 in annual revenue with dial-1 access. CBT maintains that the resulting costs of provision do not justify the expense and added complexity. CBT RBr. at 5-6.

38. Finally, the defendants deny Allnet's assertion that they improperly assess premium access charges for non-premium access. The defendants argue that the Commission's rules do not require them to charge Allnet discounted rates for the service provided.[76] CBT also contends that nothing in its tariffs suggests that premium rates would not be applied to the dial-1 service provided to Allnet.[77]

39. In reply, Allnet reiterates its main arguments, contending that the Commission has indeed found that failure to provide Allnet with dial-1 access for interstate intraLATA services constitutes discrimination.[78] Allnet argues that BellSouth's reliance upon the MFJ court's decision regarding intraLATA interstate dial-1 equal access is misplaced.[79] Allnet also contends that BellSouth's analysis of the functional equivalency between the dial-1 access BellSouth utilizes and the access it provides to Allnet would essentially nullify Section 202.[80] According to Allnet, neither CBT nor BellSouth has provided the evidence necessary to demonstrate that the defendants are restricted from providing dial-1 access by costs, limitations of technology, or public convenience.[81] Further, Allnet reiterates its point that failure to provide access equal to that of the MTS-WATS provider requires that non-premium access charges be assessed on customers denied premium access.

B. Discussion

40. The Commission has previously rejected Allnet's threshold claim that the defendants are required to provide intraLATA interstate presubscription under the terms of Commission rules and decisions. In similar complaint proceedings, we held that the Commission has not, as part of the presubscription process, required the BOCs or other LECs to provide "1+" access for interstate intraLATA MTS calls.[82]

41. We also rejected arguments identical to those made by Allnet in this proceeding that the defendants' failure to provide Allnet dial-1 access for intraLATA interstate services constitutes unreasonable discrimination within the meaning of Section 202(a) of the Act.[83] Our decision in those proceedings was based largely our determination that, while dual or multicarrier presubscription for intraLATA interstate traffic may not be technically impossible, requiring the defendants to provide "1+" access for interstate intraLATA calls would likely entail significant administrative costs and added complexities both in terms of changing presubscription procedures and in educating consumers about a different access routine.[84] Under those circumstances; and given the fact that we have not previously required the defendants or other LECs to provide interstate intraLATA presubscription, we found no basis in the record for a ruling that the defendants had acted in an unlawfully discriminatory manner.[85] Allnet has presented no new evidence or arguments in the instant case that would persuade us to depart from our previous holdings.[86]

42. Finally, Allnet's claim that the Commission's rules require defendants to charge non-premium or discounted rates as a result of their failure to provide dial-1 access is without merit for the reasons set forth in the *USWC Damages Order*.[87] During the transition to equal access, the Commission required discounts on line-side interstate access service because it was substantially inferior to the trunk-side access provided to the MTS/WATS provider, or AT&T.[88] Once access arrangements for a given IXC became substantially equivalent to the access provided to AT&T, the rate disparity was eliminated. Feature Group D, as provided to Allnet by defendants, has been accepted by the Commission as suitable for meeting the BOC and LEC equal access obligations.[89] Because neither Feature Group D nor the Commission's presubscription procedures comprehend "1+" dialing access for intraLATA, interstate calls, the absence of this capability does not render this form of access subject to discounted rates. Moreover, we note that our rules do not require discounting in all cases involving the provision of differing access. For example, in a case involving access arrangements within Puerto Rico for off-island calls, we determined that the need to enter additional digits to access certain carriers was not so bur-

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[76] *See, e.g.*, CBT Br. at 17.

[77] CBT RBr. at 6-7.

[78] *See, e.g.*, Allnet RBr., File No. E-93-025, at 8. Allnet argues that with regard to CBT, any concerns the Commission has previously voiced regarding the potential displacement of the LEC as the intraLATA toll carrier because of MFJ restrictions are not applicable to CBT because CBT is not bound by the MFJ and can provide both intraLATA and interLATA services. Therefore, Allnet argues that CBT cannot rely on the Commission's rationale put forth in the *USWC Damages Order* for a favorable ruling in this proceeding.

[79] Allnet RBr., File No. E-93-024, at 7-8.

[80] *Id.* at 8.

[81] *Id.* at 9; Allnet RBr., File No. E-93-025, at 8. To support its contention that CBT would not incur substantial expenses in implementing dial-1 access for intraLATA interstate services, Allnet filed a motion for leave to file a copy of an Ohio settlement regarding intraLATA equal access in the area served by The Western Reserve Telephone Company (Western Reserve). Allnet's motion was unopposed by CBT but CBT did file a memorandum in response to Allnet's motion. Allnet maintains that this stipulation between Western Reserve and various other parties, including Allnet, proves that the switches used by CBT can be quickly and economically modified to provide intraLATA equal access. In the interest of compiling a full and complete record, we will accept Allnet's motion and CBT's memorandum for filing. We do not, however, find the costs to Western Reserve or the ease of converting its switches probative of CBT's costs or ability to make the technological changes necessary to accommodate Allnet's request.

[82] *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3025, para. 37.

[83] *Id.* at para. 38.

[84] *Id.*

[85] *Id.*

[86] We emphasize once again, however, that our determination that the record adduced in this Section 208 complaint proceeding does not support a finding of unlawful discrimination should not be construed to prejudge the issues and arguments presented in CC Docket No. 92-237 regarding the need for and feasibility of dial-1 interstate intraLATA access. *See, e.g., USWC Damages Order*, 8 FCC Rcd at 3026. In addressing the issue we intend to give full consideration to the information and arguments presented in that docketed proceeding.

[87] *USWC Damages Order*, 8 FCC Rcd at 3026.

[88] XMTS and WATS Market Structure, CC Docket No. 78-72 (Phase I), 97 FCC 2d 834, 886 (1984).

[89] *See, e.g.*, Divestiture Related Tariffs, 101 FCC 2d 911.

densome as to warrant reduced access rates.[90] The dialing disparity in that case was at least as significant as in the instant case.

IV. CONCLUSION

43. We have carefully reviewed the extensive record before us and have found, to the extent indicated here, that the complainants are entitled to awards of damages, plus accumulated interest, compounded daily, on such damages, for the defendants' violations of the Commission's rate of return prescription for the 1989-1990 monitoring period. We have also concluded that Allnet has failed to establish that BellSouth and CBT violated Sections 201(b) and 202(a) of the Act in failing to provide dial-1 access in the manner requested by Allnet or that the defendants are required to assess non-premium access rates.

V. ORDERING CLAUSES

44. Accordingly, IT IS ORDERED, pursuant to Sections 4(i), 4(j), 201, 206, 207, 208, and 209 of the Communications Act, as amended, 47 U.S.C. §§ 154(i), 154(j), 201, 206, 207, 208, and 209, that the complaints identified in Appendix A to this Memorandum Opinion and Order ARE GRANTED to the extent indicated above and otherwise ARE DENIED.

45. IT IS FURTHER ORDERED that the Motion to Dismiss filed on November 24, 1992 by Cincinnati Bell Telephone Company, and the Motion to Dismiss filed on April 5, 1993 by New York Telephone Company ARE DENIED.

46. IT IS FURTHER ORDERED that the Motion to Amend Answer filed on April 7, 1993 by The BellSouth Telephone Companies IS GRANTED.

47. IT IS FURTHER ORDERED that the Motion to File Out of Time Response To Interrogatories filed on May 21, 1993 by Allnet Communication Services, Inc. and the Motion for Leave to File ACC's Verification to Answers to New York Telephone Company's First Set of Interrogatories to ACC Long Distance Corp. filed on May 17, 1993 by New York Telephone Company ARE GRANTED.

48. IT IS FURTHER ORDERED that the Motion for Leave to File a Response to the Reply Brief of New York Telephone Company filed on January 13, 1994 by ACC Long Distance Corporation IS GRANTED.

49. IT IS FURTHER ORDERED that the Motion for Leave To File Copy of Ohio Settlement Regarding IntraLATA Equal Access filed on February 1, 1994 by Allnet Communication Services, Inc. IS GRANTED.

50. IT IS FURTHER ORDERED that the defendants identified in Appendix C to this Memorandum Opinion and Order SHALL PAY to the complainants identified in Appendix C the amount specified there within 60 days after the release date of this Memorandum Opinion and Order.

51. IT IS FURTHER ORDERED that the defendants identified in Appendix C SHALL PAY to the complainants identified in Appendix C interest, compounded daily, on the damages specified there computed at the IRS rates set forth in Appendix D from January 1, 1991 until the date full payment is made.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

[90] Inquiry Into Policies to be Followed in the Authorization of Common Carrier Facilities to Provide Telecommunications Service off the Island of Puerto Rico, 8 FCC Rcd 63 (1992).

APPENDIX A

ACC LONG DISTANCE CORP. (ACC) filed the following complaint:

NEW YORK TELEPHONE COMPANY (NYT)	File No. E-93-054

ALLNET COMMUNICATION SERVICES, INC. (Allnet) filed the following complaints:

BELLSOUTH TELECOMMUNICATIONS, INC. (BellSouth)	File No. E-93-024
CINCINNATI BELL TELEPHONE COMPANY (CBT)	File No. E-93-025
U S WEST COMMUNICATIONS, INC. (USWC) [1]	File No. E-92-026

[1] Northwestern Bell Telephone Company, Mountain States Telephone and Telegraph Company, and Pacific Northwest Bell Telephone Company have consolidated. See The Mountain States Tele. and Tele. Co., Northwestern Bell Tele. Co., and Pacific Northwest Bell Tele. Co., 5 FCC Rcd 1982 (1990). U S West Communications, Inc. is the remaining company.

APPENDIX B

1989-1990 Rates of Return

Company	Inter-state	Common Line	Special Access	Switched Traffic Sensitive
BellSouth Tel. Co.	12.14	11.96	10.86	12.99
Cincinnati Bell Tel. Co.	11.52	11.53	8.53	13.19
New York Tel. Co.	11.59	10.04	9.00	13.35
U S WEST Communications	12.75	12.04	13.25	13.40

APPENDIX C

THE BELLSOUTH TELEPHONE COMPANIES

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS	DAMAGES AWARD
Allnet Communications Services, Inc. File No. E-93-024	133,980	44,440	89,540

[1] Allnet has stipulated to the billing information provided by the defendant for the purposes of calculating damages. We note that in using this billing information the parties have reached different results due to a number of factors. First, we agree with BellSouth that its calculation of the tax rate results in the proper rate to use because it accounts for the deductibility of state taxes for federal tax purposes and therefore more accurately reflects the effective tax rate. As we discussed above, we reject BellSouth's methodology for calculation of damages and have accepted complainant's calculations after correcting the tax rate.

CINCINNATI BELL TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES	OFFSETS [2]	DAMAGES AWARD
Allnet Communication Services, Inc. File No. E-93-025	21,712 [1]	20,910 [3]	802

[1] We note that using that information the parties have reached different results due to use of different tax rates. The tax rate CBT submitted in response to interrogatories was 34.91% and we will therefore accept complainant's calculations using the rounded-off figure of 35% rather than CBT's rounded-off figure of 34%.

[2] Allnet has stipulated to the billing information provided by the defendant for the purposes of calculating damages. As discussed in para. 30 supra, the amount actually paid by Allnet for CBT's access services is contingent on the outcome of the parties pending civil litigation in federal court. To the extent that Allnet's self-help actions are sustained as a result of that proceeding, Allnet's damages must be adjusted accordingly.

[3] The defendant erroneously calculated its offsets as underearnings below 12.40%. We have recalculated the underearnings at 12%. To the extent a carrier achieves the target rate of return of 12%, it cannot be said to have underearned. Thus, the defendant is entitled to offset $7,308 for common line category underearnings and $13,602 for special access category underearnings.

NEW YORK TELEPHONE COMPANY

[amounts in dollars]

Complainant	DAMAGES	OFFSETS [1]	DAMAGES AWARD
ACC Long Distance Corp. File No. E-93-054	74,681	64,254	10,427

[1] We accept ACC's mathematical corrections of the defendant's offsets. The numbers submitted by NYT do not comport to the formula NYT claims to have used to calculate them or to any financial theory known to the Commission.

U S WEST COMMUNICATIONS, INC.

[amounts in dollars]

Complainant	DAMAGES [1]	OFFSETS [2]	DAMAGES AWARD
Allnet Communication Services, Inc. File No. E-93-026	358,000	0	358,000

[1] Allnet has stipulated to the billing information provided by the defendant for the purposes of calculating damages.

[2] USWC provided no evidence of offsets.

APPENDIX D

Effective Period	Rate	Internal Revenue Service Citation
01/01/91 - 03/31/91	10%	Rev.Rul. 90-94, 1990-46 I.R.B. 16
04/01/91 - 06/30/91	9%	Rev.Rul. 91-20, 1991-11 I.R.B. 1
07/01/91 - 09/30/91	9%	Rev.Rul. 91-33, 1991-21 I.R.B. 1
10/01/91 - 12/31/91	9%	Rev.Rul. 91-50, 1991-37 I.R.B. 1
01/01/92 - 03/31/92	8%	Rev.Rul. 91-65, 1991-51 I.R.B. 1
04/01/92 - 06/30/92	7%	Rev.Rul. 92-21, 1992-14 I.R.B. 14
07/01/92 - 09/30/92	7%	Rev.Rul. 92-44, 1992-24 I.R.B. 86
10/01/92 - 12/31/92	6%	Rev.Rul. 92-77, 1992-38 I.R.B. 12
01/01/93 - 03/31/93	6%	Rev.Rul. 92-110, 1992-52 I.R.B. 15
04/01/93 - 06/30/93	6%	Rev.Rul. 93-24, 1993-14 I.R.B. 5
07/01/93 - 09/30/93	6%	Rev.Rul. 93-40, 1993-23 I.R.B. 9
10/01/93 - 12/31/93	6%	Rev.Rul. 93-63, 1993-30 I.R.B. 40
01/01/94 - 03/31/94	6%	Rev.Rul. 93-94, 1993-42 I.R.B. 42
04/01/94 - 06/30/94	6%	Rev.Rul. 94-21, 1994-14 I.R.B. 14

Before the
Federal Communications Commission
Washington, D.C. 20554

RAO LETTER 24
March 24, 1994

March 24, 1994

Responsible Accounting Officers: 1600E

Re: Accounting for Work Force Reduction Programs

Recently, it has come to our attention that there is a lack of uniformity among the carriers in accounting for work force reduction programs under Part 32. Several carriers have announced work force reduction programs in 1993 and have indicated that they plan to record the entire effects on their 1993 SEC Form 10-K filing in conformance with GAAP. Some of these carriers propose to follow this same accounting under Part 32 while others propose to account for these programs under Part 32 as the programs are implemented. The reason for this letter, therefore, is to establish uniformity in accounting for these work force reduction programs and to remind carriers of the Commission's policy with respect to the application of GAAP under Part 32. The accounting reflected herein should be reported in the ARMIS filings that are due at the Commission on or before April 1, 1994.

The Commission's policy on GAAP is set forth in Section 32.12(a) of its rules. This Section states that "The company's financial records shall be kept in accordance with generally accepted accounting principles to the extent permitted by this system of accounts." Thus, it is our belief that if a carrier is recording an event for financial reporting purposes pursuant to GAAP, then the carrier should also record this event for Part 32 federal accounting purposes unless Part 32 prohibits the action or we have specifically advised the carrier to do otherwise.

The Commission's policy on new GAAP standards is set forth in Section 32.16(a) of its rules. This Section states that "[The company's records and accounts shall be adjusted to apply new accounting standards prescribed by the Financial Accounting Standards Board or successor authoritative accounting standard-setting groups, in a manner consistent with generally accepted accounting principles. Commission approval of a change in accounting standard will automatically take effect 90 days after the company informs this Commission of its intention to follow the new standard, unless the Commission notifies the company to the contrary...]."

The Commission's policy with respect to uniformity of accounting standards for the industry is contained in the *GAAP Order*.[1] The *GAAP Order* included the following statements demonstrating our intention to maintain uniformity of accounting standards for telephone companies:

> To promote the needed consistency and uniformity industry wide to properly carry out our regulatory responsibilities, we are applying the same accounting standards to all carriers.[2] Furthermore, in order to maintain control over the USOA so that uniformity is maintained for all carriers, the Commission will select the accounting method carriers are to use under GAAP when GAAP permits several accounting options. The carriers will use the accounting method selected by the Commission unless we grant them a waiver to do otherwise.[3]

Based on the above guidelines, we see no basis for carriers to give accounting recognition to work force reductions for Form 10-K purposes but not for Part 32 purposes. Since Part 32 does not specifically address work force reductions, the proper accounting should be determined by applying the criteria established under GAAP to the circumstances of the work force reduction. We see no way that the same GAAP criteria applied to the same facts can result in accounting recognition under GAAP in one instance and not another. Accordingly, carriers that are showing liabilities, and one time charges for work force reductions in their 10-K reports for 1993 should reflect the work force reduction in their 1993 ARMIS filings.

At the same time, we recognize that Part 32 accounting and reporting may require modification to accommodate the Commission's regulatory needs. We believe that the accounting for work force reductions is such a case. Carriers recording liabilities for work force reductions shall record such amounts in Accounts 4120, Other Accrued Liabilities, and 4360, Other Deferred Credits, for the current and noncurrent portions, respectively, and shall charge Account 7360, Other Nonoperating Income. When the restructuring expenses are actually paid or otherwise require Part 32 recognition (for example, adjustment of the transition benefit obligation for the reductions under SFAS 106), they will be charged to the appropriate Part 32 expense accounts with a credit to cash or other appropriate account. At the same time, the liability established in Accounts 4120 and 4360 will be debited and Account 7360 will be credited. This accounting will recognize the liability consistent with GAAP, will show the effect of the restructuring on net income, and will allow delayed recognition in the regulatory operating accounts until the detailed amounts are known and amounts have actually been paid. The balance in Account 4360 related to these entries should not be deducted from the ratebase because it arose from charges to a below the line account.

This letter is issued pursuant to authority delegated under §0.291 of the Commission's Rules, 47 C.F.R. §0.291. Applications for review under Section 1.115 of the Commission's Rules, 47 C.F.R. §1.115, must be filed within 30 days of the date of this letter. *See* 47 C.F.R. §1.4(b)(2).

If you have any questions, please contact Kenneth M. Ackerman at (202) 634-1861.

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[1] Revision of the Uniform System of Accounts for Telephone Companies to Accommodate Generally Accepted Accounting Principles (Parts 31, 33, 42 and 43 of the Rules), CC Docket No. 84-469, 50 F.R. 48408 (November 25, 1985) (hereinafter *GAAP Order*).

[2] GAAP Order at 69.

[3] Id. at 71.

Sincerely,

Kenneth P. Moran
Chief, Accounting and Audits Division
Common Carrier Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

AT&T Communications Transmittal No. 6387
Tariff F.C.C. No. 1

ORDER

Adopted: March 25, 1994; Released: March 25, 1994

By the Chief, Tariff Division, Common Carrier Bureau:

1. On January 24, 1994, AT&T Communications (AT&T) filed the captioned tariff revisions on 14 days' notice. This filing lowers the rates and increases the discounts for Tariff No. 1 by creating Software Defined Network (SDN) Service Promotion 476. Under this promotion, a qualifying customer would receive discounts in the form of credits equal to five or ten percent of its "Domestic Incremental Growth," and credits equal to eight or fifteen percent of its "International Incremental Growth." The promotion is not available with SDN Service provided via Contract Tariff unless that Contract Tariff provides otherwise, or to the services provided in AT&T Tariffs F.C.C. Nos. 15 and 16. The transmittal, as amended, is currently scheduled to take effect on March 25, 1984.[1]

2. On January 27, 1993, Tel-Save, Inc. (Tel-Save) filed a petition to reject, or to suspend and investigate, Transmittal No. 6387. On January 28, 1993, the Furst Group, Inc. (Furst) also filed a petition to reject, or to suspend and investigate, the tariff transmittal. AT&T filed a reply on February 3.

3. The Common Carrier Bureau has reviewed AT&T Communications Transmittal No. 6387 and the related pleadings. We conclude that the filing does not warrant rejection because it does not, on its face, conflict with a statute or with an agency regulation or order. We further conclude that the petition does not demonstrate that an investigation is warranted at this time.

4. Accordingly, IT IS ORDERED that the petitions to reject or suspend and investigate AT&T Communications Tariff F.C.C. No. 1, Transmittal No. 6387, filed by Tel-Save, Inc. and the Furst Group, Inc. ARE DENIED.

FEDERAL COMMUNICATIONS COMMISSION

Gregory J. Vogt
Chief, Tariff Division
Common Carrier Bureau

[1] On March 21, 1994, AT&T filed Application Number 1848, amending the transmittal to make the promotion available to parties that meet their most recent minimum annual volume commitment.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 25, 1994

Released: April 1, 1994

CERTIFIED MAIL, RETURN RECEIPT REQUESTED

Agape Broadcasting	1800C1-MD
Foundation, Inc.	92070614
Licensee, KNON(FM),	92070590
Dallas, TX	92080275
4415 San Jacinto	
Dallas, TX 75204	

Dear Licensee:

This letter constitutes a NOTICE OF APPARENT LIABILITY for a forfeiture pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

The Commission has received several complaints which indicate that Radio Station KNON-(FM), Dallas, TX, by broadcasting certain lyrics at 3:55 p.m. on July 12, 1992, may have broadcast indecent language in violation of 18 U.S.C. § 1464. The attached transcript was made from tape recordings provided by the complainants.

Pursuant to 47 U.S.C. §§ 312(a)(6) and 503(b)(1)(D), the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. § 1464, which provides criminal penalties for anyone who "utters any obscene, indecent or profane language by means of radio communication."

The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. *Infinity Broadcasting Corporation of Pennsylvania*, 2 FCC Rcd 2705 (1987). The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times of day when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

It appears that the subject broadcast describes sexual and excretory activities and organs in patently offensive terms and is therefore indecent. Because it aired at mid-afternoon, when there was a reasonable risk that children may have been in the audience, it is legally actionable. Thus, it appears that on July 12, 1992, Station KNON(FM) violated 18 U.S.C. § 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, Agape Broadcasting Foundation, Inc., is hereby advised of its apparent liability for a forfeiture of twelve thousand five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and reflected in our *Policy Statement on Standards for Assessing Forfeitures*, 8 FCC Rcd 6215 (1993), *appeal pending sub nom. USTA v. FCC*, Case No. 92-1321 (D.C. Cir. July 30, 1992). Under these standards, $12,500 is the base forfeiture for the transmission of indecent or obscene material.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show, in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Attachments

Radio Station KNON(FM), Dallas, TX

Date/Time Broadcast: July 12, 1992 at 3:55 p.m. (CDT)

Material Broadcast: "I Want To Be A Homosexual"

Lyrics:

Oh, Ben, gee, I think you're really cute and sexy,

and well, I know you're straight.

But look, I know you have a girlfriend.

But if you really want to give me a blowjob,

I guess I'll let you as long as you respect me in the morning.

Suck it baby. Oh yeah, suck it real good.

And remember, queers don't produce, they seduce.

And well, everybody's a fag.

The whole goddamn world's a fag.

Don't you realize it even yet.

And um, wow.

Are you sure this is your first rim job?

You're catching on real fast, girlfriend.

Oh, oh, Ben, it feels so right.

Won't you be my homosexual husband?

I've got a little lisp, and I've been working on my limp wrist.

See, we're all in drag. I think I wanna be a faggot man.

(Unintelligible)

I wanna be, I wanna be a homosexual.

I wanna be, wanna be a homosexual.

I wanna be, wanna be a homosexual. I wanna be.

Shock the middle class.

Stick it up your punk rock ass.

You rub your little thing,

when you see phony dikes in Penthouse magazine.

So what's the difference, Mr. Cream?

When you just need a man, a beat-me-leather fag,

to take you out in drag. Oh, yeah.

I wanna be, I wanna be a homosexual.

I wanna be, wanna be a homosexual.

I wanna be, wanna be a homosexual. I wanna be.

Call me a faggot, call me a butt-loving, fudge-packing queer.

But I don't care, cause it's a strain being straight.

That makes me wanna drink a beer, and be a pansy and be at home.

Shock the middle class, stick it up your punk rock ass.

You rub your puny thing, when you see something

(Unintelligible)

pass you on the street.

Who wears short shorts? You wear short shorts.

You're so full of shit. Why don't you admit,

you don't have the balls to be a queer.

I wanna be, I wanna be a homosexual.

I wanna be, wanna be a homosexual.

I wanna be, wanna be a homosexual.

I wanna be a homosexual.

Before the
Federal Communications Commission
Washington, D.C. 20554

LETTER
March 25, 1994

Released: April 1, 1994

CERTIFIED MAIL - RETURN RECEIPT REQUESTED

Mr. Steve Bridges, Vice President 8210-RS
Flambo Broadcasting, Inc. 92030273
Licensee of Radio Station KFMH-FM, Muscatine, Iowa
3218 Mulberry Avenue
Muscatine, Iowa 52761

Dear Mr. Bridges:

This letter constitutes a Notice of Apparent Liability for a forfeiture pursuant to Section 503(b)(1)(D) of the Communications Act of 1934, as amended, under authority delegated to the Chief of the Mass Media Bureau by Section 0.283 of the Commission's Rules.

On February 21, 1992, after receiving a complaint alleging that Station KFMH-FM, Muscatine, Iowa, had broadcast indecent language in violation of 18 U.S.C. Section 1464, we asked for your comments concerning certain material broadcast on two occasions during the morning of August 30, 1991. Transcripts of the relevant passages, based in part on a tape recording of the second broadcast, were attached to our letter of inquiry. A transcript of the relevant August 30 material is also appended here.

Section 1464 of Title 18, United States Code, prohibits utterances of "any obscene, indecent or profane language by means of radio communication." Pursuant to Sections 312(a)(6) and 503(b)(1)(D) of the Communications Act, the Commission has statutory authority to take appropriate administrative action when licensees broadcast material in violation of 18 U.S.C. Section 1464. The Commission has defined indecency as language or material that, in context, depicts or describes, in terms patently offensive as measured by contemporary community standards for the broadcast medium, sexual or excretory activities or organs. The United States Court of Appeals for the District of Columbia Circuit has upheld the Commission's authority to restrict the broadcast of indecent material at times of day when there is a reasonable risk that children may be in the audience. *Action for Children's Television v. FCC*, 852 F.2d 1332 (D.C. Cir. 1988).

You state that both broadcasts in question, which occurred within approximately eight minutes of one another, were part of a live and spontaneous contest where members of the listening audience would call the station and tell their best jokes in an attempt to win $100. You claim to have repeatedly emphasized that all jokes had to be "clean" and family oriented. To ensure compliance with your standards, you assert, all callers were pre-screened to determine the acceptability of their jokes for broadcast. If the jokes were found to be acceptable during the pre-screening, the caller would then be allowed to re-tell the joke during the live broadcast. You did not use delay technology in the pre-screening process, but state that you will do so in the future if "live" telephone calls are to be aired. In this regard, you note that where jokes are to be broadcast, such material is now taped and then reviewed before it is aired.

With regard to the first broadcast, of which there is a transcript but no tape, you acknowledge that part of the broadcast occurred, but contend that the call was cut off immediately after the words "blow job." Because the transcript contains the entire joke, which you claim was not broadcast in full, you contend that the complainant and the caller must be the same person, reasoning that only the caller would know the entire joke.

In connection with the second broadcast, which occurred a few minutes after the first and which was taped by the complainant, you contend that you "auditioned" a male caller who presented a "clean" joke during the pre-screening and then substituted the one actually broadcast when the call was placed on the air. You state that you suspected this caller was the same one who had previously been cut off, but were not sure, and therefore elected to broadcast the call despite your concerns. You claim that you were horrified by the material presented, immediately admonished the caller and apologized to the audience, but that your "outraged reaction" was edited from the tape submitted by the complainant.

You argue that since these broadcasts were isolated and fleeting and were the only incidents of objectionable material to have occurred during the call-in joke contest, a patently offensive context was not created. Furthermore, you contend that you should not be held responsible for live and spontaneous broadcasts when a caller, who you believe may be a competitor intent on harassing you, deceives you and then intentionally places what he hopes will be objectionable material onto "your" air.

Because there is no tape or other evidence to establish the extent of the first broadcast, we are unable to resolve the conflict between your assertion that the joke was cut off as soon as objectionable material was encountered and the complainant's apparent contention that the entire joke was aired. Under these circumstances, and given the brief, live and unscripted nature of the material as well as its outside source, we will take no further action with respect to this broadcast. We emphasize, however, that licensees bear ultimate responsibility for the programming they broadcast, regardless of its source, and that failure to take the necessary precautions to prevent a repetition of this incident would weigh against you in any future enforcement action.

The second broadcast, however, is a different matter. While it also occurred in the context of live and spontaneous programming and was of short duration, you admit your suspicion that the caller involved was the same person who had told the objectionable joke only eight minutes earlier. Despite this substantial concern, you chose to place the call on the air rather than to discontinue the broadcast or to use precautions such as a delay device. Furthermore, the broadcast was not cut off at the first sign of questionable material. Indeed, station personnel actually encouraged the caller by inviting the punch line. Under these circumstances, your contention that the material is not actionable because it was fleeting and aired in spontaneous and live programming is unpersuasive. Finally, we find that the context of the subject broadcast rendered clear and inescapable the import of the material aired as a patently offensive reference to sexual contact with a female infant.

We conclude that the material in question is apparently indecent in that it contains language that describes sexual activities in patently offensive terms. Moreover, because the material aired at times when there was a reasonable risk that children may have been in the audience (morning hours, after 6:00 a.m.), it is legally actionable. Thus it appears that on August 30, 1991, Station KFMH-FM violated 18 U.S.C. Section 1464 by airing indecent programming. Accordingly, pursuant to Section 503(b) of the Communications Act, Flambo Broadcasting, Inc., is hereby advised of its apparent liability for a forfeiture of twelve thousand five hundred dollars ($12,500).

The amount specified was reached after consideration of the factors set forth in Section 503(b)(2) of the Communications Act of 1934, as amended, and reflected in our *Policy Statement on Standards for Assessing Forfeitures,* 8 FCC Rcd 6215 (1993), *appeal pending sub nom. USTA v. FCC,* Case No. 92-1321 (D.C. Cir. July 30, 1992). Under these standards, $12,500 is the base forfeiture for the transmission of indecent or obscene material.

In regard to this forfeiture proceeding, you are afforded a period of thirty (30) days from the date of this letter "to show in writing, why a forfeiture penalty should not be imposed or should be reduced, or to pay the forfeiture. Any showing as to why the forfeiture should not be imposed or should be reduced shall include a detailed factual statement and such documentation and affidavits as may be pertinent." 47 C.F.R. § 1.80(f)(3). Other relevant provisions of Section 1.80 of the Commission's Rules are summarized in the attachment to this letter.

FEDERAL COMMUNICATIONS COMMISSION

Roy J. Stewart, Chief
Mass Media Bureau

Attachments

Radio Station KFMH-FM, Muscatine, IA

Date/Time Broadcast: August 30, 1991, morning (after 6:00 a.m.)

Material Broadcast: Two jokes.

First Broadcast: Partial transcript provided by complainant.

Man walks into a bar and orders 12 martinis.

Bartender says, "Wo, what are you celebrating?"

Man says, "Well, I got my first blow job today."

Bartender says, "Congratulations, let me buy you another one."

Man says, "No thanks, if twelve won't take the taste out of my mouth, then nothing will."

Second Broadcast: Transcript of tape provided by complainant.

MC: Male Caller MC2: Second Male Caller MV: Male Voice FV: Female Voice

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MV: Hi.

MC: Hello.

MV: Hello.

MC: Okay, I got a good one for you.

MV: What's your name?

MC: This is, Ev.

MC: Ev. Where you calling from, Ev?

MC: Cedar Rapids.

MV: OK.

MC: What do you do after you eat a bald pussy?

MV: (Laughter) I don't know Ev.

MC: Refasten the diaper.

MV: Ah, Ev, I'm not even going to ask the Ouija(?).

FV: We're too embarrassed

MV: Yeah, we're not even going to bring it up with the spirit world.

FV: No.

MV: Sorry. Should we have the Ouija pick or, one more.

FV: Oh.

Before the
Federal Communications Commission
Washington, D.C. 20554

In the Matter of

Hawk Computers NAL/Acct No. 415HF0004
San Jose, California

Liability for
Monetary Forfeiture

NOTICE OF APPARENT LIABILITY

Adopted: March 25, 1994; Released: April 1, 1994

By the Field Operations Bureau:

I. INTRODUCTION

1. This is a Notice of Apparent Liability for Monetary Forfeiture issued pursuant to Section 503(b) of the Communications Act of 1934, as amended (the Act), 47 C.F.R. § 503(b), and 1.80 of the Commission's Rules, 47 C.F.R. § 1.80, to Hawk Computers for failure to provide test samples and data in violation of Section 2.946 of the Commission's Rules, 47 C.F.R. § 2.946.

2. The appropriate amount of forfeiture for this violation is $4,000.

II. BACKGROUND

3. On March 31, 1993, Commission engineering personnel from the Sampling and Measurements Branch, Authorization and Evaluation Division, Office of Engineering and Technology (the FCC Laboratory), requested a sample of a computer authorized under FCC ID: HSG2TA386AA10. The post-grant sample was requested as a result of a complaint received by the Technical Standards Branch that the computers marketed under the FCC ID did not appear to be in compliance with the conditions placed on the grant of equipment authorization.

4. This is the second time that Hawk has failed to respond to a Commission request for a sample of the computer in question. Previously, Hawk failed to reply to an October 1992 request.

III. DISCUSSION

5. Section 2.946 of the Commission's Rules states that any party holding a grant of equipment authorization issued by the Commission shall provide test sample(s) or data upon request by the Commission. Failure to comply with such request within 60 days will be cause for forfeiture. Hawk Computers has failed to provide the requested computer samples even though the Commission has previously requested samples.

IV. CONCLUSION

6. Pursuant to the Commission's policy for assessing forfeitures, Policy Statement, Standards for Assessing Forfeitures, 8 FCC Rcd 6215 (1993), and Section 503(b)(2) of the Act, the base forfeiture amount for failure to provide test samples and data as required under Section 2.946 is $4,000.

7. The appropriate amount for this forfeiture is therefore $4,000. No adjustments appear warranted.

V. ORDERING CLAUSES

8. Accordingly, pursuant to Section 503(b) of the Communications Act, 47 U.S.C. § 503(b) and Section 1.80 of the Commission's Rules, 47 U.S.C. § 1.80, IT IS ORDERED, that Hawk Computers IS APPARENTLY LIABLE FOR A MONETARY FORFEITURE in the amount of four thousand dollars ($4,000) for willful violation of Section 302 of the Communications Act, and Section 2.946 of the Commission's Rules.

9. IT IS FURTHER ORDERED, pursuant to Section 1.80(f)(3) of the Commission's Rules, that Hawk Computers shall, within 30 days of release of this Notice pay the full amount of the forfeiture or file a written response showing why the forfeiture should be reduced or not imposed. Any statements regarding inability to pay must be supported by appropriate documentation.[1] Send written responses regarding why the forfeiture should be reduced or not imposed to:

Federal Communications Commission
Field Operations Bureau
Enforcement Division
ATTN: NAL No. 415HF0004
RM 744, Mail Stop MDF/1500E3
1919 M Street, N.W.
Washington, D.C. 20554

Forfeitures shall be paid by check or money order made payable to the Federal Communications Commission. The remittance should be marked "Acct. No. 415HF0004" and mailed to the following address:

Federal Communications Commission
Post Office Box 73482
Chicago, Illinois 60673-7482

10. IT IS FURTHER ORDERED that this notice shall be sent, by certified mail, to Hawk Computers, 2056 Bering Drive, San Jose, CA 95131.

[1] Claims of inability to pay should be supported by tax returns or other financial statements for the most recent three years.

FEDERAL COMMUNICATIONS COMMISSION

Lauren J. Belvin
Chief, Enforcement Division
Field Operations Bureau

Before the
Federal Communications Commission
Washington, D.C. 20554

PUBLIC NOTICE

Released: March 10, 1994

ADDITIONAL COMMENT SOUGHT ON RULES GOVERNING TELEPHONE COMPANIES' USE OF CUSTOMER PROPRIETARY NETWORK INFORMATION

CC Docket No. 90-623
CC Docket No. 92-256

Customer proprietary network information, or CPNI, encompasses any information about customers' network services and their use of those services that a telephone company possesses because it provides those network services.[1] The Commission has in place rules that govern the Bell Operating Companies' (BOCs) use of CPNI in marketing enhanced services and customer premises equipment (CPE). These CPNI rules for enhanced services are the subject of reconsideration petitions in the *Computer III Remand Order* proceeding, CC Docket No. 90-623. In this public notice, we seek comment on customers' CPNI-related privacy expectations, and whether any changes in our rules are required to achieve the best balance between customer's privacy interests, competitive equity, and efficiency.

Under the current rules, any customer can request that its CPNI be withheld from the BOCs' enhanced services and CPE marketing personnel, although such personnel are generally allowed to make use of CPNI without prior customer authorization. Prior authorization is required only before BOC enhanced services marketing personnel are given access to the CPNI of customers with more than twenty lines. Third parties, such as independent enhanced services providers, must obtain advance authorization from the customer in order to obtain access to CPNI. The Commission's rules also require that the BOCs provide an annual written notice of CPNI rights to multiline business customers.[2] At present these rules do not apply to independent telephone companies, but the Commission has decided to apply them to GTE in its provision of enhanced services.[3]

The CPNI rules, developed and refined over a period of several years, are designed to balance considerations of customer privacy, efficiency, and competitive equity. In the past, the Commission has concluded that customers' expectations of privacy could be met without a notification obligation or a prior authorization requirement for internal BOC use of residential and small business customers' CPNI.[4] In the most recent order addressing CPNI, the Commission concluded that a prior authorization rule would as a practical matter deny to all but the largest business customers the one-stop-shopping benefits of integrated marketing of basic and enhanced services by BOCs.[5] The Commission also concluded that to the extent that access to CPNI is limited to employees of a single integrated company, this did not generally raise significant privacy concerns.[6] The Commission reaffirmed that, although privacy issues are raised by disclosure of CPNI to third parties outside the BOC, the CPNI rules have always protected against such disclosure.[7]

In recent months, however, local telephone companies have planned and entered into a number of alliances, acquisitions, and mergers with non-telephone company partners. In this changing environment, access to CPNI among affiliated companies may raise additional privacy concerns. In recognition of these changes, we now seek further comment from the public on whether the existing CPNI safeguards will continue in the future to strike the best balance between customers' privacy interests, competitive equity, and efficiency. In assessing the CPNI rules that best achieve this balance, parties should comment specifically on the issue of residential and small business customers' CPNI-related privacy expectations, and on whether the rules should apply to LECs other than the BOCs and GTE. In addition, parties recommending a change in the CPNI rules governing the provision of enhanced services should discuss whether their proposed rules should also apply to the provision of CPE.

Interested parties are to file comments by **April 11, 1994** and reply comments by **May 2, 1994** with the Secretary, FCC, 1919 M Street, N.W., Washington, D.C. 20554. A copy should also be sent to Rose M. Crellin, Common Carrier Bureau, FCC, Room 544, 1919 M Street, N.W., Washington, D.C. 20554, and to the Commission's copy contractor, International Transcription Service, Inc., 2100 M Street, N.W., Suite 140, Washington, D.C. 20037.

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[1] *See* Filing and Review of Open Network Architecture Plans, 4 FCC Rcd 1, 215 (1988).

[2] *See Computer III* Remand Proceedings: Bell Operating Company Safeguards and Tier 1 Local Exchange Company Safeguards, CC Docket No. 90-623, 6 FCC Rcd 7571, 7605-14 (1991) (*Computer III Remand Order);* Furnishing of Customer Premises Equipment by the Bell Operating Telephone Companies and the Independent Telephone Companies, CC Docket No. 86-79, 2 FCC Rcd 143, 152-153 (1987).

[3] In the Matter of Application of Open Network Architecture and Nondiscrimination Safeguards to GTE Corporation, Report and Order, CC Docket No. 92-256 (adopted March 8, 1994).

[4] *See, e.g.,* Amendment of Section 64.502 of the Commission's Rules and Regulations (Third Computer Inquiry), CC Docket No. 85-229, 2 FCC Rcd 3035, ¶ 164 (1987) (notification requirement limited to multiline business customers); *see also Computer III Remand Order* 6 FCC Rcd 7571, n.159 (1991) (prior authorization required for customers with more than twenty lines; more extensive prior authorization requirement found not necessary to protect customers' privacy interests).

[5] *Computer III Remand Order* at 7610 and n.155.

[6] The Commission's CPNI rules allow the BOCs to provide CPE and enhanced services under various forms of business organization. BOCs may utilize customer CPNI to jointly market enhanced services and CPE with these forms of business organization, consistent with other requirements of the Commission's CPE, ONA, and CPNI rules. *Computer III Phase I Further Reconsideration Order,* 3 FCC Rcd 1135, 1139 (1988) at para. 33.

[7] *Id.* at 7612, n.159.

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Action by the Commission on March 9, 1994.

FEDERAL COMMUNICATIONS COMMISSION

Before the
Federal Communications Commission
Washington, D.C. 20554

CC Docket No. 94-1

In the Matter of

Price Cap Performance Review
for Local Exchange Carriers

NOTICE OF PROPOSED RULEMAKING

Adopted: January 19, 1994; Released: February 16, 1994

Comment Date: April 18, 1994
Reply Comment Date: May 17, 1994

By the Commission: Commissioner Barrett issuing a separate statement.

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I. EXECUTIVE SUMMARY

1. The price cap plan for local exchange carriers (LECs) that took effect three years ago, on January 1, 1991, represented an important regulatory reform effort. Price caps sought to require even monopoly carriers to reduce their rates, while creating positive incentives for greater efficiency and innovation. This in turn was expected to produce lower rates and improved services benefitting customers as well as society and the many businesses that use telecommunications to produce goods and services. The price cap plan also reaffirmed the Commission's commitment to the various programs that promote affordable telephone service throughout the United States.

2. Within the last few years, however, we have witnessed dramatic changes in telecommunications technology and markets, especially changes leading to lower prices and greater usage of telecommunications as networks are interconnected and opened to competition. The Open Network Architecture tariffs, expanded interconnection, 800 data base technology, video dialtone, and the allocation of spectrum for wireless Personal Communications Services are all examples of the increasing capability of the telephone network, and all contribute to making that network open to market forces.

3. Yet these changes, important as they are, are only the prelude. The potential contribution of telecommunications to our society and economy has never been greater. New technologies hold the promise of a national telecommunications infrastructure capable of providing rapid distribution of the information and entertainment consumers will need. Effective competition in telecommunications investment, facilities, and services has the potential to help meet those needs in the most efficient and least costly manner possible, while stimulating domestic economic growth and international competitiveness. This economic growth should, in turn, increase jobs for Americans.

4. As a forum for considering further regulatory reform, the scheduled fourth year review of the LEC price cap plan could not be more timely. The basic purpose of this review will be to consider whether the plan should be revised to better serve the goals of the Communications Act and the public interest in the years ahead. Specifically, we seek data, analysis, and comment on three sets of issues.

5. First, we request comment on whether the goals of price caps should be refined to assure that regulation facilitates the deployment of the facilities and services consumers and businesses will need in the years ahead. We ask for example, how the current price cap plan or possible revisions facilitate economic growth and the creation of jobs for Americans. We also seek comment on how the price cap plan might further the goal of deploying the national information infrastructure, including facilities needed to provide educational, health, and emergency services. We also will consider whether we need to revise the plan to better meet the goal of providing universal service to all geographic areas and of comparable type and quality for all Americans at affordable prices.

6. Second, we identify a set of baseline issues raising questions of whether to revise the current plan to improve its performance or to adjust the plan in response to changes in technology, regulation, and the market in the near term. Any such revisions and adjustments would be targeted to take effect on January 1, 1995. These baseline issues include implementation of infrastructure development goals, possible changes in the composition of price cap baskets and bands, appropriate changes in the productivity factor or rate levels, the revision or elimination of the sharing and low-end adjustment mechanisms, and possible revisions to the rules governing new services.

7. Third, we request comments on a set of transition issues, issues related to adjustments needed to prepare the baseline plan for anticipated changes in market structure, technology, and regulation within the next few years. This inquiry focuses on transitional steps toward reduced or streamlined regulation of LEC services as competition grows. We ask comment on the current state of competi-

tion and the criteria by which competition should be measured, appropriate transition stages, and possible revisions to the price cap baskets as competition develops. Also, we request comment on the effect price cap LEC entry into related industries (*e.g.*, cable TV) and BOC entry into inter-LATA marketplaces should have on the LEC price cap plan.

8. The regulatory policies we apply to the price cap LECs, which provide local telephone facilities essential to the current national network, should help prepare for the network that is now emerging, the information superhighway of the future. We expect that the record developed in this proceeding will guide us in shaping the LEC price cap plan to play its part in setting regulatory policies to assure that the bright potential offered us by modern telecommunications becomes a reality.

II. INTRODUCTION

9. With this Notice, we begin the fourth year review of the performance of local exchange carriers (LECs) under price cap regulation. As the Commission stated when it adopted price caps for LECs in 1990, this review will be a comprehensive examination of the effects of price cap regulation using all available data and information. To begin this proceeding, we summarize information collected by the Commission in monitoring the course of LEC performance since price cap tariffs took effect on January 1, 1991, including data on rates, earnings, and service quality. From the information we have now, it appears that access rates have declined, service quality remains the same as before price caps, and earnings have been higher than under rate of return regulation. Based on our experience with the plan, we discuss several ways in which the plan may be improved, as well as related aspects of the AT&T price cap plan. In addition, we examine changes in the local access marketplace that may increase competition for LEC services and that might warrant a transition from price caps to more flexible streamlined regulation. Finally, we request data, analysis, and comments regarding both revisions to the current baseline plan and transitional mechanisms that could adapt the plan to certain or likely marketplace changes over the next several years.

III. BACKGROUND

10. The Commission adopted price cap regulation as part of a fundamental reappraisal of telecommunications rate regulation in the wake of the changes that had swept over telecommunications in the last few decades, but especially since the Bell System divestiture in 1984. Technological advances in computers, fiber optics, and microelectronics transformed the capabilities of "plain old telephone service" while expanding the range and quality of new services, and creating new opportunities for improved efficiency. In place of the monolithic Bell System, customers may now select telecommunications equipment and services from hundreds of suppliers offering an ever-expanding menu of choices.[1]

11. Moving from traditional rate of return regulation to price cap regulation was a significant improvement and response to these dramatic changes. Traditional rate of return regulation provided few incentives for telephone companies to respond to these changes and opportunities by becoming more innovative and efficient. Under rate of return regulation, rates are set to recover the carrier's costs plus a reasonable rate of return on invested capital. Such "cost-plus" regulation potentially discourages efficient investment, and encourages cost-shifting when the carrier also participates in more competitive markets.[2] Further, carriers achieving the prescribed rate of return have little profit incentive to introduce new and innovative services. In addition, rate of return regulation requires elaborate regulatory oversight of all the carrier's costs.

12. In contrast to rate of return regulation, a regulatory system that caps prices creates profit incentives similar to those in fully competitive markets and generates positive motivations for reasonable rates, innovation, productivity growth, and accurate cost allocation, while reducing regulatory burdens. The plan's method is to control prices directly, rather than indirectly by examining costs and profits. The price cap limits are set by the Commission to assure that rates are reasonable and lower than under rate of return regulation.[3] The effect of capping prices rather than profits is to replicate the marketplace forces of competition. Prices are held to a maximum level by the cap, much as they are by the rivalry among companies in competitive markets. The carrier gains the opportunity to earn higher profits, but may do so only by operating more efficiently or by developing new services customers want, not by raising overall prices. This opportunity to increase its profits in turn encourages the carrier to apply its resources in the most efficient manner possible, providing more and better service at lower cost. In this way, the carrier can increase its productivity, and thus its profitability. At the same time, customers directly benefit from lower prices and new services that better meet their needs, and indirectly from the lower costs of non-telecommunications goods and services provided by firms that use telecommunications in their businesses. Also, consumers are protected from cross-subsidization by the grouping of similar services in price cap baskets, which prevents a carrier from raising rates in one basket and lowering them in another to the detriment of customers taking service in the first basket, and from rapid rate changes by annual rate band limits. The 0.5 percent annual Consumer Productivity Dividend (CPD) under price caps approximates this two percent rate reduction, during the initial implementation period, before the performance review.[4] In addition, all Americans benefit from the economic growth that should be generated by price caps incentives, particularly because telecommunications is a significant and growing portion of the economy generally. One econometric forecasting organization estimated that if price caps reduced rates by 2

[1] *See* J.R. Haring and E.R. Kwerel, OPP Working Paper No. 22, "Competition Policy in the Post-Equal Access Market," (Feb. 1977) and K.B. Levitz, OPP Working Paper No. 23, "Loosening the Ties That Bind: Regulating the Interstate Telecommunications Market for the 1990s," (Feb. 1987).

[2] *See, e.g.*, H. Averch and L. Johnson, "Behavior of the Firm Under Regulatory Constraint," 52 Amer. Econ. Rev. 1052 (1962); 2 A.E. Kahn, The Economics of Regulation, ch. 2 (1971); and K.E. Train, Optimal Regulation, ch. 1 (1991).

[3] *See infra* para. 17.

[4] The CPD assigns the first price cap productivity gains to customers in the form of lower rates.

percent, the effect on the economy after 5 years would be a $5.0 billion annual increase in the Gross National Product, a gain of 22,000 jobs, and a $1.1 billion reduction in the federal debt.[5]

13. The Commission initially considered adopting a single price cap plan for AT&T and the largest local exchange carriers, but decided to apply price caps first to AT&T.[6] This plan took effect on July 1, 1989. After further study and comments, the Commission adopted the LEC price cap plan in 1990; the initial LEC price cap rates took effect on January 1, 1991.[7] In adopting both plans, the Commission recognized the need to monitor the carriers' performance to assure that the plans worked as intended. We scheduled a comprehensive review of each plan in its fourth year of operation. The fourth year performance review for AT&T was completed in the summer of 1993. In that proceeding, the Commission concluded that price caps had worked well, producing for AT&T the lower rates, improved efficiency, and innovation the Commission had sought to achieve.[8]

IV. THE LEC PRICE CAP PLAN

14. The price cap plan adopted for the LECs is similar to the AT&T plan and shares many of its rules. The carrier's interstate services are grouped within baskets. Rates within each basket are capped based on a formula that limits the maximum percentage by which rate changes can occur in the aggregate to inflation (measured by the Gross National Product Price Index or GNP-PI) minus a productivity factor. The resulting figure is also adjusted for a limited set of exogenous cost changes, generally those caused by changes in administrative, legislative, or judicial action beyond the carrier's control and not otherwise reflected in price cap calculations. This formula produces the Price Cap Index (PCI) for the basket. Within each basket, rate changes in any one year are also limited by rate bands. The appropriate rate band for each designated service category is computed around the Service Band Index (SBI).

15. Rate changes that conform to the limits set by a LEC's PCIs and SBIs are presumed lawful and permitted to take effect under streamlined review, on 14 days' notice. Should a LEC decide to file rates outside the PCI or SBI limits, the price cap rules call for more rigorous scrutiny. More extensive documentation must be filed, the presumption of lawfulness disappears, and longer notice periods apply. Above-cap and above-band filings carry a heavy burden of justification and a strong likelihood of suspension. For new services that will be subject to price caps, the carrier must submit a study of projected costs or net revenue effects.

16. The LEC plan does, however, differ from the AT&T plan in substantial ways. The interstate services the LECs offer are primarily access services used by long distance carriers, and the LEC service baskets thus differ from the AT&T baskets of services offered primarily to end users. In the *LEC Price Cap Order*, the Commission adopted four baskets (Common Line, Traffic Sensitive Switched, Special Access, and Interexchange) which corresponded to the access rate categories established by Part 69 of the Commission's Rules. The productivity factor, reflecting historical telephone industry productivity growth, and a Consumer Productivity Dividend of 0.5 percent annually, was set at a minimum of 3.3 percent for the three access service baskets. For the Interexchange basket, the productivity factor was set at 3.0 percent, matching the factor established for AT&T's interexchange services.

17. The LEC price cap plan also includes sharing and low-end adjustment mechanisms that an individual LEC's rate of return performance can trigger. The sharing and low-end adjustments mechanisms were intended to compensate for the possiblity of an error in the choice of the productivity factor and variations among the different LECs. Under the sharing mechanism, if a LEC elects the minimum 3.3 percent productivity factor, thus reducing its rates by 3.3 percent annually after adjustment for inflation and exogenous cost changes, it is allowed to retain all earnings up to 12.25 percent, and half of all higher earnings up to 16.25 percent. Above 16.25 percent, all earnings return to ratepayers through adjustments to the PCI in the following year. Alternatively, LECs may elect a more challenging 4.3 percent productivity factor, and earn the right to retain all earnings up to 13.25 percent and half of all higher earnings up to 17.25 percent. All earnings over 17.25 percent return to ratepayers. Conversely, under the low-end adjustment mechanism, if a LEC's earnings fall below 10.25 percent in any base year, the LEC is granted an automatic one year upward adjustment in its PCI in the next year, sufficient to bring its earnings back up to 10.25 percent. The rate of return thresholds in the sharing and low-end adjustment mechanisms were adopted in conjunction with the Commission's prescription of 11.25 percent as a reasonable target for rate of return carriers beginning in 1990.

18. The LEC price cap plan is mandatory for the largest LECs, the seven Regional Bell Operating Companies (RBOCs) and GTE. It is optional for other LECs. Companies and their affiliates were required to enter price caps on an "all or nothing" basis, with the exception of any average schedule affiliates. Those LECs electing price caps include United Telephone, Rochester Telephone, The Lincoln Telephone and Telegraph Company, and Southern New England Telephone.

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[5] "The Impact on the U.S. Economy of Regulatory Changes in the Interstate Long Distance Telecommunications Market," Wharton Econometric Forecasting Associates, submitted as Appendix E, Comments of AT&T, CC Docket No. 87-313, submitted Oct. 19, 1987.

[6] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Notice of Proposed Rulemaking, 2 FCC Rcd 5208 (1987) (*Notice);* Further Notice of Proposed Rulemaking, 3 FCC Rcd 3195 (1988) (*Further Notice);* Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873 (1989) (*AT&T Price Cap Order); modified on recon.*, 6 FCC Rcd 665 (1990) (*AT&T Price Cap Reconsideration Order).*

[7] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, 5 FCC Rcd 6786 (1990) (*LEC Price Cap Order),* Erratum, 5 FCC Rcd 7664 (Com. Car. Bur. 1990), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*LEC Reconsideration Order), aff'd,* National Rural Telecom Ass'n v. FCC, 988 F.2d 174 (D.C. Cir. 1993).

[8] Price Cap Performance Review for AT&T, CC Docket No. 92-134, 8 FCC Rcd 6968 (1993). The Commission has proposed relatively minor adjustments to the AT&T price cap plan, including moving some interexchange services that may be effectively competitive out of price caps and into more streamlined regulation. Revisions to Price Cap Rules for AT&T, CC Docket No. 93-197, 8 FCC Rcd 5205 (1993).

V. REGULATORY CHANGES DURING THE INITIAL LEC PRICE CAP PERIOD

19. The LEC price cap plan was intended to remain relatively stable during its first four years, but in fact numerous regulatory changes have been made since the plan was adopted, some of which have required revisions in the price cap rules. In other cases, changes occurred when the Commission has been faced with resolving issues of price cap implementation.

20. Among the most significant regulatory changes occurring within the last three years, or that are scheduled to occur within the near future, are those reflecting the Commission's continuing efforts to lower prices and stimulate demand by expanding customer choice and opening communications marketplaces to competition. These efforts have facilitated the development of competition both in local exchange markets that LECs have traditionally dominated and in markets from which LECs have been excluded. For example, the Open Network Architecture tariffs took effect, offering unbundled services designed for enhanced service providers (ESPs).[9] Commission decisions requiring expanded interconnection of special access and switched transport[10] and revising the rate structure of local transport should increase local competition.[11] Implementation of 800 data base technology permits improved services and increased competition in the 800 service market. The allocation of spectrum and establishment of market structure rules for wireless Personal Communications Services (PCS) has the potential to generate a range of new services that could compete with existing landline and wireless local exchange services.

21. Meanwhile, the LECs have gained the opportunity to enter additional markets. The MFJ's prohibition on BOC provision of information services was removed in 1991. LECs may now provide "video dial tone" services.[12] Several legislative initiatives are underway in Congress that would reduce or eliminate regulatory barriers to the convergence of voice, data, and video services through a variety of networks within a framework of open competition. The implications of these changes in the services LECs provide, often using the same facilities employed for interstate access, indicate the need to reevaluate aspects of price cap regulation. We expect this review to be broad enough to evaluate the effect of this convergence of services on price cap regulation of LEC access services.

VI. INDUSTRY AND MARKETPLACE CHANGES

22. Changes in the industry and marketplace have been at least as rapid. Within the last several years, we have witnessed incipient competition within the local exchange. As fiber optic technology reduced the costs of transmission, a growing number of competitive access providers (CAPs) deployed fiber networks to compete for the traffic of high-volume business customers in large cities. In 1990, the CAPs deployed 55,000 fiber miles. As of the end of 1992, this figure had increased to approximately 131,000 fiber miles.[13] By way of comparison, the large price cap LECs deployed 3,121,062 fiber miles in 1990, and approximately 5,504,370 fiber miles in 1992.[14] While the investment and revenues of the CAPs are still a small fraction of the LECs,[15] the CAPs do provide alternative services in many cities; their ability to compete with the LECs should be enhanced by implementation of Commission decisions mandating special access and switched transport interconnection.

23. Since the beginning of price cap regulation, price cap LECs have made approximately 200 new service filings. New technologies such as Common Channel Signalling (CCS) have been deployed, leading to the development of the Line Information Data Base (LIDB) and 800 data base, which permits 800 number portability. New services and standards such as video dialtone, frame relay, Switched Multimegabit Data Service (SMDS), Asynchronous Transfer Modes (ATMs), and Synchronous Optical Networks (Sonet) have expanded the capabilities of the telephone network. Also, the percentage of lines with access to new technologies such as Signalling System 7 (SS7) have grown from 17 percent of total price cap lines in 1989, to 65 percent of total price cap lines in 1992.

24. Recent industry events suggest that in place of the traditionally separate markets and networks for local and long distance telephone service and for broadcast and cable TV, telecommunications appears to be evolving toward the transfer of all forms of information over interconnected digital networks. The Clinton Administration has initiated efforts to link these networks through development of the National Information Infrastructure (NII), the information equivalent of America's superhighways.[16] "Infotainment" has been coined to describe the merger of information and entertainment envisioned in services such as movies on demand and interactive video. Major alliances and mergers

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[9] *See* Section 69.118 of the Commission's Rules, 47 C.F.R. Section 69.118.

[10] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order*), *modified on recon.*, 8 FCC Rcd 127 (1992), *modified on second recon.*, 8 FCC Rcd 7341 (1993), *petitions for recon. pending, appeal pending sub nom.* Bell Atlantic Corp. v. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992); *see also id.* CC Docket No. 91-141, Second Report and Order, 8 FCC Rcd 7374 (1993).

[11] Transport Rate Structure and Pricing, CC Docket No. 91-213, 7 FCC Rcd 7006 (1992), *petition for recon. pending, modified on recon.*, 8 FCC Rcd 5370 (1993), *modified on second recon.*, 8 FCC Rcd 6233 (1993), *petitions for recon. pending, appeal dismissed sub nom.* New England Tel. and Tel. Co. v. FCC, No. 93-1494 (D.C. Cir. Sept. 7, 1993), *appeal pending sub nom.* Full Service Computing Corp. v. FCC, No. 93-1670 (D.C. Cir., filed Oct. 1993).

[12] Telephone Company - Cable Television Cross-Ownership Rules, Sections 63-54-63.58, Second Report and Order, Recommendation to Congress, and Second Further Notice Of Proposed Rulemaking, 7 FCC Rcd 5781, 5783 (1992), *petition for recon. pending.*

[13] Fiber Deployment Update, End of Year 1992, Industry and Analysis Division, Common Carrier Bureau, Federal Communications Commission (released Apr. 30, 1993). These numbers reflect both a growing number of CAPs deploying fiber miles, as well as an increase in the number of fiber miles deployed by each CAP. *Id.*

[14] *Id.* These numbers reflect fiber miles deployed by the BOCs, GTE/Contel, and United Telephone. *Id.* Fiber mileage data was not collected from the other price cap LECs.

[15] Based on information contained on the 1993 Form 431 Telecommunications Relay Service Fund worksheets, it appears that the three largest CAPs had less than $500 million of alternate access service revenues in 1992.

[16] *See* Speech by Vice President Gore (Gore) at the University of California at Los Angeles, Jan. 11, 1994 (Speech by Gore at UCLA) (Gore announced the Administration's plans to introduce a bill that "[(1)] will contain provisions designed to ensure that each telephone carrier's networks will be readily accessible

across traditional market boundaries have already occurred or have been proposed for example among price cap telephone companies and cable TV companies. All of these developments should be considered in determining what changes need to be made to price cap regulation.

VII. LEC PERFORMANCE UNDER PRICE CAPS

25. During the first three years of LEC price caps, all of the LECs have kept their rates at or below the applicable PCIs; none has requested above-cap rates. Overall, LEC interstate access rates are currently $1.5 billion lower than at the start of price caps, despite overall inflation in the economy of 11.6 percent.[17] Of this total, $373 million is the result of LEC pricing below the cap.[18] For example, for 1993, Ameritech priced services within its interexchange basket, special access basket, and traffic sensitive basket 14.3, 5.3, and 1.5 percent, respectively, below the relevant price cap indexes. In comparison, for 1993, NYNEX priced services within its traffic sensitive and special access baskets at the relevant price cap indexes, and priced services within the interexchange basket .05 percent below the applicable price cap index. The LECs generally reduced DS1 and DS3 prices faster than other services.

26. LEC profits also increased under price cap regulation. The initial price cap rates in January, 1991 were targeted at an 11.25 percent rate of return. In 1992, the most recent year for which complete data are available, the overall interstate rate of return for price cap LECs had risen to 12.25 percent, and all price cap LECs earned above 11.25 percent. For the RBOCs, earnings ranged from a low of 11.41 percent for Bell Atlantic to a high of 13.32 percent for NYNEX. GTE earned 11.26 percent, Rochester 12.00 percent, and United 12.81 percent.

27. Service quality monitoring data indicate that service quality under price caps has been similar to levels under rate of return regulation. Performance standards such as trunk blockage, installation and repair intervals, and dial tone response times have been met successfully over 95 percent of the time. The price cap LEC average unscheduled downtime per loop remains less than 4 minutes per year. However, other measures, notably residential service quality complaints, show the possibility of some problem; the number of service quality complaints per million residential customers rose in 1991, and remained high through the first quarter of 1993.[19]

28. Through the Section 63.100 service outage reports required of all carriers, the Commission continues to monitor LEC network reliability.[20] The major service outages on the LECs' networks (*i.e.*, the outages caused by (1) Hurricane Andrew in Florida in 1992, (2) the riots in Los Angeles in May of 1992, and (3) the flooding in the Mid-West in July and August of 1993) were fully investigated by the Commission and did not appear to be directly traceable to price cap regulation or to any strategy to maximize short-term profits. The majority of the service outages reported by carriers under Section 63.100 appear to have been the result of fiber cuts caused by construction activity. The Commission currently is studying the specific reasons behind these construction-related fiber cuts.

29. The Commission has also monitored LEC infrastructure development under price caps, including deployment of technologically superior hardware and software. For example, under rate of return regulation, the price cap LECs were replacing electromechanical switches with more advanced digital switches at the rate of about 5 percent of total lines per year (1 percent of total lines were connected to digital switches in 1980, 40 percent had been converted by 1989). The conversion rate under price caps has been about 12 percent per year; by 1992, 75 percent of LEC price cap carriers' lines were connected to digital switches. The deployment of ISDN (from 6 percent of total price cap lines in 1989, to 26 percent in 1992), and SS7 (from 17 percent of total price cap lines in 1989, to 65 percent in 1992) are similar measures of deployment of new technologies under price caps. Further, mandatory price cap LECs have extended their service in non-urban areas from 11.5 million lines to 17.4 million lines under price cap regulation, and therefore, from 10 percent of total lines to 15 percent. Fiber optic transmission facilities have grown from less than 4.5 million equipped channels in 1989 to over 10.4 million in 1992. Further, the percentage of households subscribing to telephone service rose from an annual average of 93.3 percent in 1990, to 94.2 percent in July of 1993.[21] The percentage of households subscribing to telephone service, however, varies, *inter alia*, by state, the householder's race, and family income.[22] For example, the percentage of households subscribing to telephone service ranges from lows of 86.2 and 86.7 in Alaska and Arkansas, respectively, to highs of 97.0 and and 97.2 in Delaware and Pennsylvania, respectively.[23] Also, the percentage of households subscribing to telephone service where the householder is white, black, or Hispanic is 95.5, 85.0, and 87.4, respectively.[24] Further, the percentage of households subscribing to telephone service with an income below $5,000 is 73.2, with an income between $10,000 and $12,499 is 91.5, with an income between $20,000 and $24,999 is 96.5,

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to other users . . . . and [(2)] will create an affirmative obligation to interconnect and to afford nondiscriminatory access to network facilities, services, functions and information.").

[17] This figure represents the increase in GNP-PI from the fourth quarter of 1989, through the fourth quarter of 1992, as reflected in LEC price cap indices.

[18] *See* Price Cap LEC Annual Access Tariff Filings.

[19] Specifically, the average number of residential customer service quality complaints per million price cap access lines rose from 31 in the first quarter of 1991, to 43 in the fourth quarter of 1991. Further, from the first quarter of 1992, through the first quarter of 1993, the average number of such complaints ranged from a low of 39, to a high of 45. The average number of such complaints fell to 24 in the second quarter of 1993.

[20] We note, however, that the Section 63.100 service outage reporting requirements were adopted, in part, because in the summer of 1991, Pacific Telesis and Bell Atlantic experienced a number of incidents associated with newly installed software that resulted in more than 30 million blocked call attempts. *See Service Outage Order*, CC Docket No. 91-273, 8 FCC Rcd 8517 at para. 12 n.15 (1993).

[21] Telephone Subscribership in the United States, Industry Analysis Division, Common Carrier Bureau, Federal Communications Commission, (rel. Dec. 29, 1993); *see also id.* at 2 ("The number and percentage of households that have telephone service represent the most basic measures of the extent of universal service.").

[22] *Id.*

[23] *Id.*

[24] *Id.*

and with an income at or above $40,000 exceeds 99.[25] There is also some evidence that telephone penetration rates are substantially lower in certain insular areas, such as Indian reservations.[26] These figures raise the issue of whether all Americans have an equal opportunity to use telephone service at affordable rates.

30. In addition to services ordered by the Commission such as Open Network Architecture services and 800 Database, the LECs have initiated a range of new services under price cap regulation. These include electronic directory assistance (*e.g.*, Ameritech Directory Search, Bell Atlantic Electrical Request),[27] access to the Common Channel Signalling system (*e.g.*, NYNEX Common Channel Signalling Access/SS7 and SNET SS7),[28] improved video transmission (Pacific Bell Digital Video, SW Bell Business Video),[29] frame relay (*e.g.*, US West Frame Relay),[30] and upgraded fiber optic services (*e.g.*, GTE Fiberconnect).[31]

VIII. DISCUSSION

A. Policy Goals and Directions for Regulation of LECs

31. The goals of price cap regulation, as we said when we adopted LEC price caps in October, 1990, include ensuring that LEC rates are just, reasonable, and nondiscriminatory, and promoting a communications system that offers innovative, high quality services. It was hoped that price caps, by replicating many of the effects of competition, would encourage price cap LECs to make economic decisions such as they would make in a fully competitive market. In particular, the Commission hoped that price caps would encourage the LECs to modernize their networks, deploy new technologies, and offer new services. To achieve these goals, LEC price cap regulation harnesses the profit incentive to reward companies that become more productive and efficient, while ensuring that productivity and efficiency gains are shared with ratepayers.[32] Consumers would benefit from the lower rates resulting from the capping of prices and the increasing productivity and lowering costs of the LECs. The national economy would benefit because the lower telecommunications prices would help lower the prices of the many goods and services using telecommunications in their businesses, and from increased jobs and domestic economic growth generated from increased sales in international and domestic markets. The LECs, in turn, would benefit from the heightened demand for services resulting from the lower rate levels under price cap regulation. Accordingly, the Commission believed that price cap regulation would promote economic growth and stimulate "an even healthier, more vital sector of the U.S. economy[.]"[33]

32. The Commission also reaffirmed its commitment to the range of programs that promote affordable telephone service throughout the United States. The Commission adjusted the LEC price cap plan to ensure that these programs continued intact[34] and pledged to initiate a further proceeding to deal specifically with regulatory issues of concern to small and mid-size LECs.[35] We concluded this proceeding in 1993, adopting optional incentive regulation plans tailored for small and mid-size LECs.[36] In addition, the Commission recently adopted interim rules to moderate the growth of the Universal Service Fund (USF) during the pendency of the Commission's broader USF rulemaking.[37]

33. We believe that the basic goals of price caps remain valid. The lower prices and improved services generated by price caps should continue to benefit consumers, in much the same manner as the competitive markets price caps seeks to replicate. However, as we discussed earlier in this Notice, the last few years have seen important changes in telecommunications technology and markets. Markets and services are converging as telecommunications technology improves and enlarges the capabilities of the telecommunications networks. In the years to come, there is every reason to believe that telecommunications will increase in importance to society and the domestic economy, provided that regulation facilitates the deployment of the facilities and services consumers and businesses will need. For these reasons, we believe that a refinement of our goals in this proceeding is warranted. In this proceeding, we expect to consider whether the current LEC price cap plan facilitates economic growth and the creation of jobs for American workers. One of the goals of price cap regulation is to reward carriers for becoming more productive and efficient. Cost-reducing technological and organizational innovations may result in reduced carrier workforces, at least initially. However, the expansion of the telecommunications sector should create more jobs as lower prices attract new customers and induce existing customers to make greater use of telecommunications services. Moreover, low-

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[25] *Id.*

[26] *See, e.g.*, Speech by Congressman Richardson at the National Telecommunications and Infrastructure Administration Field Hearing in Albuquerque, New Mexico, Dec. 16, 1993 ("[A]mong the Native American reservations and pueblos of New Mexico, over 60 percent of households have no telephone.").

[27] Ameritech Directory Search and Bell Atlantic Electrical Request allow customers to electronically gather data from the directory assistance listings without the assistance of an operator or reference to printed white pages.

[28] NYNEX Common Channel Signalling Access/SS7 provides customers with access to a digital data network that interfaces with the telephone company voice/data network for services using American National Standard Institute (ANSI) Common Channel Signalling Protocol. Common Channel Signalling Protocol is an out-of-band signalling network that uses the ANSI code. SNET SS7 is a non-chargeable rate option available when a customer orders switched access Feature Group D (*i.e.*, equal access) service.

[29] Pacific Bell Digital Video is a digital video service which has better picture and audio quality and shorter provisioning intervals than current analog video service. SW Bell Business Video provides for two-way compressed video/audio service on a two-point basis. It is also suitable for teleconferencing, which connects two groups at different locations.

[30] US West Frame Relay is a fast packet switched service.

[31] GTE Fiberconnect provides the customer with fiber optic facilities capable of transmitting isochronous serial data at a rate of 6.312 Mbps.

[32] *Second Report and Order*, 5 FCC Rcd at 6787.

[33] *LEC Price Cap Order*, 5 FCC Rcd at 6790-91.

[34] *LEC Price Cap Order*, 5 FCC Rcd at 6826.

[35] *Id.* at 6827.

[36] Regulatory Reform for Local Exchange Carriers Subject to Rate of Return Regulation, 8 FCC Rcd 4545 (1993).

[37] Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, CC Docket No. 80-286, FCC 93-549, X FCC Rcd XXX (adopted Dec. 22, 1993, released Dec. 23, 1993). Under these rules, which will remain in effect for a two-year period beginning on January 1, 1994, the total USF would be subject to an indexed cap to moderate growth in the fund.

er telecommunications prices and innovative services should help create new jobs in the many businesses that increasingly rely upon telecommunications in the production of goods and services. We request comment on the extent to which price cap regulation has succeeded in improving consumer welfare, benefitting the economy, and creating net economic gains and jobs, and on the potential future effects of the current plan or possible revisions. Also, we solicit comment on whether the economic and job growth predicted in the Wharton Report occurred and whether such growth can be expected to continue in the future.[38]

34. We also expect to determine whether the price cap plan furthers the development of the telecommunications infrastructure and services that will be needed in the years ahead. For instance, we will consider whether price cap regulation encourages the development of the national information infrastructure or needed telecommunications services for education, health care and emergency services. In addition, we will consider whether price cap regulation is consistent with the goal of promoting universal service to all geographic areas and of comparable type and quality for all Americans at affordable prices.[39] We will also consider whether revisions to the plan are required to better meet those needs, for example, by promoting competition, open access to the network, and wide availability of the services the infrastructure of the future can provide. We request comment on whether and how the goals of the LEC price cap plan should be revised to better serve the purposes of the Communications Act and the public interest in the years ahead.

General Issue 1: Should the Commission revise the goals of the LEC price cap plan so that the plan may better achieve the purposes of the Communications Act and the public interest, and if so what should be the revised goals?

General Issue 2: What has been the effect of the price cap plan on consumer welfare, the economy, and the creation of jobs both in telecommunications and in other sectors of the economy. Quantify the effects of the price cap plan or of possible revisions on consumer welfare, the economy, and the creation of jobs in the future; *e.g.*, quantify the extent to which productivity is increased, the extent to which this increased productivity leads to domestic job growth, the extent to which profit margins improve because of the lower cost of telecommunications, and the ways in which the conduct of business has changed as a result of increasing reliance on telecommunications. We ask commenters to provide data and analysis on how the current price cap plan or a revised plan would affect growth in telecommunications markets, revenues, profits by LECs and CAPs, competition in local exchange and access services, competition in interexchange services, and levels of demand for telecommunications services.

B. Changes to the Baseline LEC Price Cap Plan and Future Transitional Changes

35. Conceptually, it appears useful to divide the issues in this review into two groups. The first set are what might be called baseline issues, questions of whether to revise the current plan to improve its performance or to adjust the plan to changes in circumstances. These changes would be targeted to take effect at the end of the fourth year, effective January 1, 1995, or soon thereafter. This set includes issues of whether to revise the current productivity factor or maximum rate level and the rate of return thresholds in the sharing and low-end adjustment mechanisms. The second set of issues relates to adjustments needed to prepare the baseline plan for anticipated changes in the market, technology, and regulation within the next few years. These issues include developing criteria for moving to reduced or streamlined regulation of LEC services as competition grows. These two sets of issues no doubt overlap. Nevertheless, we believe that a more useful record will be developed if the analysis and comments focus separately on the question of which changes if any should occur in 1995 (*i.e.*, changes to the baseline plan) and which should be implemented later (*i.e.*, transitional changes).

C. Baseline Issues for Comment

Baseline Issue 1: Infrastructure Development

36. The goal of deploying an advanced telecommunications infrastructure available to all Americans may justify steps to guide LEC investment and other decisions. The national information infrastructure that is now being designed and deployed has great potential to stimulate economic growth and job creation, while providing needed telecommunications services for education, health care, and emergency services. Many of the local links in this infrastructure will be provided by the price cap LECs. Revisions to the LEC price cap plan may help this infrastructure achieve its full potential. For example, we solicit comments on how the facilities of the network can be made available to all users, including suppliers of other telecommunications services and to other businesses that can improve their productivity by greater use of this infrastructure. Most important, we request comments on meeting the universal service goal of providing services of comparable type and quality to all Americans at affordable prices. We request comment on whether and how the LEC price cap plan should be revised to help development of a ubiquitous, national information infrastructure. With this in mind, we request comment on the following issues:

Baseline Issue 1a: Whether, and if so how, the Commission should revise the LEC price cap plan to support the development of a ubiquitous national information infrastructure.

Baseline Issue 1b: Whether the goal of providing universal service to all geographic areas and of equal type and quality for all Americans at affordable prices is being met, or whether we should revise the LEC price cap plan to ensure the provision of universal service.

Baseline Issue 1c: We request that interested parties submit data and analysis regarding the rate at which price-cap LECs are replacing copper wire with fiber optic cable and increasing the bandwidth capacity of copper wires with signal compression techniques and other technologies.

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[38] *See supra* para. 12.

[39] *See generally* Speech by Gore at UCLA (Gore announced the Administration's intent to support a bill that will "guarantee[] access to essential services[.]").

Baseline Issue 2: Composition of Baskets and Bands

i. Background and Current Provisions

37. In view of developing competition in the local exchange services market, one of our major areas of concern will clearly be whether the LEC plan should be revised to permit more streamlined and flexible regulation of LEC services when market changes justify such revisions. One model for this approach is the path the Commission has already followed in the case of AT&T. AT&T's services were assigned to baskets largely on the basis of the perceived level of competition for the services.[40] Services in two of the baskets initially placed under price caps were later moved almost entirely from price caps and into streamlined regulation, as the services were found to be effectively competitive.[41] The Commission is currently considering moving additional services out of the remaining AT&T price cap basket.

38. The Commission's LEC price cap plan divides services among four service baskets, each subject to its own price cap.[42] The four service baskets are common line, traffic sensitive, trunking, and interexchange services.[43] Within these baskets, services are grouped into separate service categories, each of which has its own pricing constraints, designed to limit the LECs' ability to offset increases in the prices of certain services within a basket by reducing the prices of other services in the basket.[44] There are four service categories within the traffic sensitive basket,[45] and six service categories and two subcategories within the trunking basket.[46] The assignment of services to price cap baskets and bands is intended to replicate the effect of competition. Services with common characteristics, for example similar levels of competition, are grouped within a basket, for which price cap indexes are computed. The carrier has little incentive to shift costs between baskets, because changes in prices within one basket do not affect prices in the others. Within the basket, however, the carrier has the incentive to change prices, in order to increase efficiency and maximize its profits. In the *LEC Price Cap Order*, the Commission stated that its goal in employing a system of baskets and bands is to permit incremental changes in prices that will reward LECs that become more productive and efficient, without subjecting ratepayers to precipitous changes in the prices for LEC services and without enabling LECs to disadvantage one class of ratepayers to the benefit of another class.[47] Separating services subject to differing levels of competition into separate baskets and service categories hinders the LECs' ability to increase prices of less competitive services so that the LECs can decrease prices of more competitive services without a concomitant revenue loss. LECs are permitted modest pricing flexibility to adjust prices in response to their business needs and the needs of their customers.

ii. Discussion

39. Several proposals have been put forward to modify the composition of the LEC baskets. United States Telephone Association (USTA) avers that our current price cap basket design must be restructured to allow the LECs to meet customer requirements. USTA suggests that the Commission create transport, switching, and public policy baskets, as well as a basket designated as "other" to include interexchange services and rate elements that do not fit in the other three baskets.[48] Ameritech has requested that the

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[40] *AT&T Price Cap Order*, 4 FCC Rcd at 3052.

[41] *Competition in the Interstate Interexchange Marketplace*, CC Docket No. 90-132, 6 FCC Rcd 5880 (1991) (*IXC Rulemaking*), *modified on recon.*, 7 FCC Rcd 2677 (1992).

[42] *See LEC Price Cap Order*, 5 FCC Rcd at 6811; *see also id.* ("Subdividing LEC services into baskets substantially curbs a carrier's pricing flexibility, as well as its ability to engage in unlawful cost shifting between the broad groups of services."); *see also* Transport Rate Structure and Pricing, CC Docket No. 91-213, FCC 94-9, X FCC Rcd XXX, para. 12 (adopted Jan.19, 1994, released Jan.31, 1994) (*Second Transport Order*).

[43] *Second Transport Order*, X FCC Rcd XXX at para. 10. In the *LEC Price Cap Order*, the Commission divided services among baskets according to the then-existing interstate access structure set forth in Part 69 of the Rules. *LEC Price Cap Order*, 5 FCC Rcd at 6788; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2679. In the *Second Transport Order*, the Commission realigned the division of services among baskets by combining transport and special access services into the newly-created trunking basket. The Commission decided to "mov[e] transport services out of the traffic sensitive basket and into a basket with special access services . . . [to] prevent the LECs from offsetting rate reductions for transport services subject to competition with rate increases for switching and other traffic sensitive services, which are subject to much less competition at this time." *Second Transport Order*, X FCC Rcd at para. 12.

[44] *Second Transport Order*, X FCC Rcd at para. 1; *see also LEC Price Cap Order*, 5 FCC Rcd at 6788, 6811; *see also id.* at 6811 ("By grouping similar services together [into the same service category, the LEC price cap plan] . . . acts as a substantial bar on a LEC's ability to engage in anticompetitive practices."). Streamlined tariff procedures apply to LEC rate changes that are below the price cap index (PCI) levels for the basket and within the service category bands. By contrast, LECs must file cost support to justify rate changes that fall outside the constraints applicable to baskets or service categories. *Second Transport Order*, X FCC Rcd at para. 3 n.3.

[45] The service categories within the traffic sensitive basket are (1) local switching, (2) information, (3) data base access, and (4) billing name and address. *Second Transport Order*, X FCC Rcd at para. 12. *See also* Treatment of Operator Services Under Price Cap Regulation, CC Docket No. 93-124, Notice of Proposed Rulemaking, 8 FCC Rcd 3655 (1993) (the Commission proposes to establish a new category in the basket for traffic sensitive switched interstate access elements to include the rates set by local exchange carriers for operator services).

[46] The six service categories within the trunking basket are (1) voice grade flat-rated transport, voice grade special access, WATS, metallic, and telegraph, (2) audio, and video, (3) high capacity and Digital Data Service (DDS) (4) wideband data and wideband analog, (5) tandem-switched transport, and (6) the interconnection charge. Within the high capacity-DDS service category are the two subcategories for (1) DS1 special access and DS1 flat-rated transport and (2) DS3 special access and DS3 flat-rated transport. *Second Transport Order*, X FCC Rcd at paras. 12, 21; *see also id.* at paras. 21-23 (the Commission incorporated the flat-rated transport offerings at the voice grade, DS1, and DS3 levels into the corresponding voice grade, DS1, and DS3 service categories and subcategories for special access after determining that flat-rated transport and special access are similar services provided over similar facilities and will be subject to similar competitive pressures).

[47] *LEC Price Cap Order*, 5 FCC Rcd at 6810-11.

[48] United States Telephone Association Interstate Access Reform Proposal, at 15-17 (dated Jan.12, 1993); *id.* at 16 (USTA's Public Policy basket would include, for example, Lifeline Assis-

Commission grant waivers of the price cap rules permitting it to consolidate access services into two categories, one for competitive services and one for non-competitive services.[49]

40. Since the initiation of price cap regulation, the Commission has adopted other policies and rules that we expect will increase competition to the LEC services that currently are subject to price cap regulation. For example, in the *Special Access Expanded Interconnection Order,* CC Docket No. 91-141,[50] the Commission required Tier 1 LECs, excluding NECA pool members, to file tariffs offering expanded interconnection for special access services to all interested parties. Specifically, the order required these LECs to permit competitors and users to terminate their own special access transmission facilities at LEC central offices and to interconnect with LEC special access services.

41. At least three types of issues are presented by proposals to revise or restructure the LEC baskets. The first set encompass whether the revisions will carry out the goals of price caps, including increased efficiency, reasonable nondiscriminatory rates, and the minimal regulation necessary to achieve those goals. Second, we need to identify and understand the implications of the revisions for other aspects of the price cap plan. For example, changes in the composition of the baskets (*e.g.,* movement of services from one basket to another or movement of a service entirely out of price caps) might warrant adjustments to other features of the plan, such as the sharing mechanisms and the formula used within the common line basket. Third, if the Commission adopts a mechanism to permit adjusting the price cap plan in response to changes in local exchange access competition, the baseline basket structure that will serve as the starting point for that transition becomes very important. This structure might include grouping services subject to similar competitive pressures in the same baskets. Commenters who propose revisions to the LEC baskets and bands should address these issues and explain how the changes they seek would improve the price cap plan in these issue areas.

42. With these considerations in mind, we request comment on the following issue:

Baseline Issue 2: Whether the rules relating to the LEC price cap baskets and bands should be revised. Specifically, commenters should address whether current or revised price cap baskets and bands would reflect expected levels of competition for LEC interstate services, or other relevant common characteristics. For example, we request information and comment on whether differences in pricing behavior within and among baskets evidences different levels of competition.

Baseline Issue 3: Changes in Productivity Factors or Rate Levels

i. Background and Current Provisions

43. The price cap decisions replaced rate of return regulation with an incentive-based system of regulation that rewards carriers whose performance exceeds a benchmark measure of efficiency improvements, and penalizes those who fall short. The benchmark, known as the price cap index or PCI, is adjusted each year based on a measure of inflation that embodies economy-wide productivity gains and price changes (the Gross National Product Price Index (GNP-PI)), minus a productivity factor (reflecting the amount by which LEC productivity historically exceeded that of the economy as a whole, plus a consumer productivity dividend of 0.5 percent).[51] The PCI may be further adjusted for exogenous cost changes. In the *LEC Price Cap Order,* we mandated a price cap index that includes at least a 3.3 percent productivity offset[52] each year. Alternatively, price cap LECs may elect a 4.3 percent productivity offset.[53]

ii. Discussion

44. All the price cap LECs have experienced higher earnings on average under price caps than in earlier periods. Their rate of return has increased from 11.25 percent at the start of price caps,[54] to an average of 12.25

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tance, Universal Service Fund, carrier common line, long term support, and any other elements established for public policy purposes).

[49] Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region, Appendix at A-11 (filed Mar. 1, 1993) (Ameritech Petition). Also, Ameritech has requested waivers to allow it to remove competitive services from LEC price cap regulation (including rules relating to pricing bands and floors) and "to cap rates for services in the competitive class for three years, at an inflationary measure (GNPPI)[.]" *Id.* In addition, Ameritech has requested waivers to allow it to "apply the current price cap formula to non-competitive services, and permanently incorporate any sharing at the 1993/94 level through a one-time rate reduction in that amount . . . and to forego any individual rate increases for the first three years of the plan for [non-competitive services.]" *Id.*

[50] Expanded Interconnection with Local Telephone Company Facilities, CC Docket No. 91-141, Report and Order and Notice of Proposed Rulemaking, 7 FCC Rcd 7369 (1992) (*Expanded Interconnection Order), modified on recon.,* 8 FCC Rcd 127 (1992), *petitions for recon. pending, appeal pending sub nom.* Bell Atlantic Corp. FCC, No. 92-1619 (D.C. Cir., filed Nov. 25, 1992).

[51] In the *LEC Price Cap Order,* we determined that the GNP-PI does not fully reflect that the LECs' higher than average growth in productivity had resulted in lower than average telephone prices, relative to inflation. We therefore concluded that a productivity factor offset must be included in the price cap formula to ensure that rates continued to decline in relation to the GNP-PI. *LEC Price Cap Order,* 5 FCC Rcd at 6796.

[52] *LEC Price Cap Order,* 5 FCC Rcd at 6796. The 3.3 percent productivity factor was based largely upon two Commission staff studies investigating the extent to which LECs had historically outperformed the economy as a whole in obtaining improved productivity. *Id.* A short term study examined productivity trends in interstate access from 1984 through 1990; a long term study covered interstate charges generally for the years 1930 through 1989. The 0.5 percent Consumer Productivity Dividend was then added, assigning the first price cap productivity gains to customers in the form of lower rates.

[53] *LEC Price Cap Order,* 5 FCC Rcd at 6799. By selecting the more challenging 4.3 percent productivity offset, the LEC lowers its rates an additional 1 percent, but may retain a greater portion of its profits if it can increase its productivity. *Id.* at 6796; *see also LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2641-42. Because interexchange services are capped based on the productivity offset we adopted to cap AT&T services (*i.e.,* 3 percent), a LEC selecting the higher productivity factor must use a 4 percent productivity factor for its interexchange basket. *LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2642.

[54] The price cap indexes were initiated at a rate of return of 11.25 percent. *See LEC Price Cap Order,* 5 FCC Rcd at 6814; *see also LEC Price Cap Reconsideration Order,* 6 FCC Rcd at 2643.

percent in 1992.[55] Not only have the LECs achieved relatively higher earnings under price caps, but they also have enjoyed sharply declining interest rates, which have fallen to their lowest levels in many years. Moreover, because these earnings gains and cost decreases occurred while the national economy was relatively weak, the LECs' productivity and profitability are likely to improve even more as the economy recovers and they experience greater demand per line for calling and thus greater apparent utilization of their networks. On the other hand, interest rates may also rise as the economy improves.

45. Based on these developments and considerations, we believe that there may be a good case for revising the 3.3 percent and 4.3 percent productivity factors, requiring a one-time reduction in rates, or both. Alternatively, it may be appropriate to adopt a permanent mechanism for adjusting the plan to reflect changes in interest rates. For example, this might permit either an automatic review or an automatic adjustment to the plan if interest rates rise substantially in the future. In making any such changes, however, it is crucial to avoid modifications that might undercut the incentives price caps seeks to create. Under price caps, this incentive is profitability. The LECs are rewarded with higher profits if they achieve productivity growth above the target, and are penalized with lower profits if they fall short. For this incentive to work properly, the productivity factor should not be changed either to recapture all profits or to compensate LECs for relatively low efficiency performances in the past. At the same time, the productivity factor should be set at a level ensuring fair and reasonable rates for the LECs' customers.

46. In light of the above discussion, we seek comment on the following issues:

Baseline Issue 3a: Whether the productivity factor used to compute the LEC price cap indices should be changed; in addition, or in the alternative, whether a one-time change in the LEC's price cap index should be required. If a rate reduction were required, commenters should discuss how such a reduction should be distributed among price cap baskets and service categories. As a further alternative, whether the Commission should adopt a mechanism which would adjust the plan to reflect changes in interest rates. Commenters should discuss how such a mechanism would operate, including, for example, what deviations in interest rates would trigger the adjustment mechanism. Commenters should address how the option they advocate would preserve or improve price cap incentives and assure just and reasonable rates.

Baseline Issue 3b: Are the price cap LECs profits levels reasonable under the current LEC price cap plan in light of the price cap goal that higher profits are intended to be the reward for attaining increased efficiencies?

Baseline Issue 3c: If the productivity factor should be changed, what method should the Commission use to determine a revised and reasonable productivity factor?

Baseline Issue 4: Sharing and Low-end Adjustment Mechanisms

i. Background

47. In adopting the sharing and low-end adjustment mechanisms, we sought to balance competing goals.[56] In recognition of possible errors in the productivity factor and variations in the productivity of the LECs, the Commission adopted the sharing and low-end adjustment mechanisms to ensure that LECs and their customers share fairly the risks and rewards of future productivity gains, and to prevent any price cap LEC from experiencing such low earnings over an extended period of time that its ability to provide quality service and attract capital would be seriously impaired.[57] On the other hand, we knew that sharing and low-end adjustment mechanisms might dampen the LECs' risks and rewards, and thus reduce the incentives offered by a "pure" price cap plan. We did not adopt sharing and low-end adjustment mechanisms for AT&T because competition similarly limits AT&T's earnings.[58]

ii. Current provisions

48. Under the sharing mechanism, a LEC that selects and outperforms the 3.3 percent productivity offset is entitled to retain all of its earnings up to 1 percent above the initial 11.25 percent rate of return[59] (*i.e.*, 12.25 percent).[60] A LEC using the 3.3 percent productivity offset must share 50 percent of its earnings between 12.25 percent and 16.25 percent, and 100 percent of its earnings in excess of 16.25 percent.[61] The sharing mechanism effectively allows a LEC selecting a 3.3 percent productivity offset to reach a maximum 14.25 percent rate of return.[62]

49. A LEC selecting the higher 4.3 percent productivity offset may retain all of its earnings up to 13.25 percent. The LEC, however, must share with its customers 50 percent of its earnings between 13.25 percent and 17.25 percent, and 100 percent of its earnings in excess of 17.25 percent. In electing a productivity offset of 4.3 percent, a LEC is effectively able to reach a 15.25 percent rate of return.[63]

50. The shared amounts are calculated on the basis of total interstate earnings and not on a basket-by-basket basis.[64] The customer's share plus interest is returned

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[55] For the BOCs, 1992 rates of return ranged from a low of 11.41 percent for Bell Atlantic to a high of 13.32 percent for NYNEX, while GTE earned 11.26 percent, Rochester 12 percent, and United 12.81 percent.

[56] *LEC Price Cap Order*, 5 FCC Rcd at 6801.

[57] *LEC Price Cap Order*, 5 FCC Rcd at 6787, 6801, 6802; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2677.

[58] *AT&T Price Cap Order*, 4 FCC Rcd at 3144.

[59] The initial 11.25 percent level corresponded to the rate of return established for rate of return carriers in *Represcribing the Authorized Rate of Return for Interstate Service of Local Exchange Carriers*, 5 FCC Rcd 7507 (1990) (*Represcription Order*).

[60] *LEC Price Cap Order*, 5 FCC Rcd at 6788.

[61] *LEC Price Cap Order*, 5 FCC Rcd at 6801.

[62] *LEC Price Cap Order*, 5 FCC Rcd at 6801.

[63] *LEC Price Cap Order*, 5 FCC Rcd at 6788, 6801-02; *see also Price Cap Reconsideration Order*, 6 FCC Rcd at 2652.

[64] *LEC Price Cap Order*, 5 FCC Rcd at 6805; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2680; *see also id.* at 2679 (The Commission affirms that sharing based on total interstate earnings, rather than on per-basket earnings is appro-

though a one-time reduction in the PCI for the next rate period, calculated in the same manner as other exogenous changes in the formula.[65]

51. Under the low end adjustment mechanism, if the earnings of a LEC fall below 10.25 percent in a base year, the LEC may adjust its rates upward to target earnings to 10.25 percent, using the prior period as the baseline.[66] We set the lower adjustment mark at a level which is symmetrical with the 12.25 percent top of the no sharing zone.[67]

iii. Discussion

52. Several LECs have suggested that rate of return prescription and sharing mechanism are inappropriate under price caps where the emphasis is on placing constraints on price, rather than on earnings.[68] They therefore recommend that the sharing mechanism be eliminated from price caps to provide LECs with a greater incentive to invest in the infrastructure because they will have "an opportunity to maximize the return on shareholder equity over the long run."[69] Also, during informal discussions with Commission staff, MCI maintained that the sharing mechanism does not always operate as it was intended because the LECs can manipulate reported earnings. MCI therefore suggested that the sharing mechanism be eliminated in favor of an increase in the productivity factor to at least 5 percent for all LECs. Alternatively, MCI suggested that the 100 percent sharing mechanism be eliminated for LECs electing a 5.3 percent productivity factor. Further, AT&T suggested during informal discussions with Commission staff that the Commission prohibit the LECs from using the lower adjustment formula if the low earnings are the result of a one-time charge against earnings.

53. The Commission recognized that the sharing and low-end adjustment mechanisms might reduce efficiency incentives and would certainly increase the complexity of the plan. Our concern was that if the productivity factor was an erroneous measure of productivity for an individual price cap LEC, the productivity factor might produce unintended and undesirable results for that LEC or its customers. Thus, an initial question for review is whether this concern remains valid, or whether the sharing and low-end adjustment mechanisms can be replaced by adjustments to the productivity factor or other aspects of the plan.

54. If the sharing and low-end adjustment mechanisms are retained, we also must consider whether to revise the rate of return thresholds triggering their application. The current sharing and low-end adjustment mechanisms are centered around 11.25 percent, the LECs' cost of capital in 1988. Because interest rates are now much lower, the 11.25 percent rate of return may be higher than warranted under existing economic conditions. This may be cause to adjust the sharing and low-end adjustment mechanisms.

55. We therefore request comment on the following issues:

Baseline Issue 4a: Whether the sharing and low-end adjustment mechanisms should be realigned with capital costs, and if so, how this should be done.

Baseline Issue 4b: Whether the sharing and low-end adjustment mechanisms should be revised or eliminated.

Baseline Issue 5: Common Line Formula

i. Background and Current Provisions

56. In the *LEC Price Cap Order*, we adopted a formula to cap non-traffic sensitive access rates (*i.e.*, common line charges) different from the basic price cap mechanism.[70] This difference stems from the unique characteristics of the carrier common line charge, which recovers a portion of non-traffic sensitive costs through a traffic sensitive, per minute charge. We designed the common line cap formula based on the view that interexchange carriers as well as the LECs can influence interstate usage of local common lines. To ensure that both the LECs and the interexchange carriers have incentives to exploit opportunities for increased productivity associated with greater per line usage of common line, the mechanism we adopted for common line services (the "Balanced 50/50 formula") contains an adjustment that splits the benefits from growth (as well as the risks of a decline) in minutes per line for common line service between the LECs and the interexchange carriers.[71]

57. Some commenters in the initial LEC Price Cap rulemaking asserted that the LECs have little ability to stimulate increased interstate long-distance calling and, therefore, there is no rational basis for awarding half the benefits in demand growth to the LECs under the Balanced 50/50 formula.[72] Accordingly, they suggested that because common line costs do not vary with usage, a more rational approach to capping the common line basket would be to impose a cap on the price of each common line (or "subscriber line").[73] They argued that because common line revenues are collected both through flat charges (the subscriber line charges) and through usage-based charges (the carrier common line charge), the effect of a per-line price cap approach would be to drive the per-minute charge down as usage increases. As costs per minute fall, rates per minute would fall proportionally. They therefore contended that a per line approach would give LECs the incentive to reduce their costs for providing subscriber lines, while giving their customers a price incentive to increase usage.[74]

ii. Discussion

58. In the *LEC Price Cap Order*, we acknowledged the uncertainty of identifying the current sources of carrier common line demand growth, and predicting future

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priate because "[t]he sharing mechanism . . . is created as a backstop to the plan as a whole . . . . [and t]he plan stresses LEC overall productivity[.]").

[65] *LEC Price Cap Order*, 5 FCC Rcd at 6801; *see also LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2686.

[66] *LEC Price Cap Order*, 5 FCC Rcd at 6788.

[67] *LEC Price Cap Order*, 5 FCC Rcd at 6802.

[68] *See, e.g.*, United States Telephone Association Interstate Access Reform Proposal at iii (USTA January Proposal) (dated Jan.12, 1993); *see also id.* at 27.

[69] USTA January Proposal at iii; *see also id.* at 27.

[70] *LEC Price Cap Order*, 5 FCC Rcd at 6787.

[71] *LEC Price Cap Order*, 5 FCC Rcd at 6794.

[72] *See, e.g., LEC Price Cap Order*, 5 FCC Rcd at 6860-61 (Commissioner Ervin S. Duggan, dissenting).

[73] *See, e.g., id.*

[74] *See, e.g., id.*

sources and their magnitude.[75] We also stated that the 50/50 division strikes the best balance in splitting incentives for this particular form of productivity growth, at least in the initial four-year period of price cap regulation.[76] Further, we stated that as we gained experience with the price cap plan, we might develop sufficient evidence to calculate a different split.[77] Given that we now have actual experience in the formula's operation, we therefore will use this proceeding to reexamine our selection of the Balanced 50/50 formula for capping the common line basket. We may, for example, consider the use of a per line formula to cap common line charges. This may warrant adjustments to other parts of the plan, *e.g.*, the overall productivity factor.[78]

59. Accordingly, we request comment on the following issues:

Baseline Issue 5a: Whether the Commission should reconsider its use of the Balanced 50/50 formula to cap common line charges.

Baseline Issue 5b: If so, what method should the Commission use to cap common line charges?

Baseline Issue 5c: If the Commission were to adopt a per-line charge, how should this affect possible changes in the productivity factor or the composition of baskets, *e.g.*, changes such as the inclusion of common line rates in a public policy basket?

Baseline Issue 5d: What incentives are generated by the current Balanced 50/50 formula, the per line formula, or other possible formulas? What incentives should the formula seek to generate?

Baseline Issue 6: Exogenous Cost Changes

i. Background and current provisions

60. In the *LEC Price Cap Order*, the Commission determined that certain costs incurred by LECs caused by administrative, legislative or judicial requirements beyond the control of the carriers should result in an adjustment to the PCI to ensure that the price cap formula does not lead to unreasonably high or unreasonably low rates.[79] The Commission found that a decision not to recognize these costs in the PCI would either unjustly punish or reward the carrier by treating them as changes in the carrier's level of efficiency.[80] The Commission called these costs "exogenous" or "Z factor" costs. Examples of cost changes that we consider to be exogenous include: (1) completing the amortization of depreciation reserve deficiencies; (2) amendments to the Uniform System of Accounts; (3) changes in the Separations Manual; (4) reallocation of regulated investment to nonregulated activities; and (5) changes in transitional and long term support.[81] Exogenous treatment was not permitted for other categories including depreciation rate changes and equal access costs.[82]

61. In practice, the LECs have requested exogenous cost increases for several events not listed in the existing rules, including changes in federal regulations affecting the disposal of telephone poles[83] and implementation of a state telephone facilities improvement plan.[84] The most significant request for higher exogenous costs concerned a change in GAAP accounting for employee post retirement liabilities, such as medical benefits.[85] In that case, the LECs relied largely upon an elaborate economic model which they claimed demonstrated that the impact of the change would be disproportionate for the price cap LECs, although the change applied to all companies and affected only the way costs are reported.

62. The Commission has also determined that not all changes beyond the carrier's control are to be given exogenous treatment. For example, the Commission held that although tax law changes are outside the carrier's control, general tax law changes are reflected in the GNP-PI component of the price cap formula and, therefore, exogenous treatment of such changes would unfairly "double count" their impact. Accordingly, the Commission decided that only those tax changes that "uniquely or disproportionately" affect the LECs would be eligible for exogenous treatment.[86] Similarly, although changes in generally accepted accounting principles (GAAP) are outside the carrier's control, the Commission stated that "[i]f a GAAP change is universal enough to be reflected in the inflation measure, exogenous cost treatment would result in double counting within the context of the PCI."[87] Therefore, we decided to accord exogenous treatment to GAAP changes (which have been adopted by the Financial Accounting Standards Board and have become effective) only if the costs are neither within the control of the price cap carriers nor reflected in the price cap formula.[88]

ii. Discussion

63. The exogenous category of cost changes operates as an exception to the price cap requirement that cost changes do not alter the price cap index and its attendant incentives. While price cap regulation assumes that the LECs will take responsibility for how well or badly they manage their business, we judged they should not be held responsible for cost changes that were not of their choosing, were out of their control, and were not otherwise reflected in the price cap formula. In effect, we continued "cost plus" regulation in these cases.

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[75] *LEC Price Cap Order*, 5 FCC Rcd at 6795 n.83

[76] *LEC Price Cap Order*, 5 FCC Rcd at 6795.

[77] *LEC Price Cap Order*, 5 FCC Rcd at 6795 n.83.

[78] *See also LEC Price Cap Order*, 5 FCC Rcd at 6798 (the Commission stated that because the Balanced 50/50 formula gives part of the benefit of demand growth to LECs, while the per line formula does not, it requires a productivity offset that is about 0.51 percent higher than per line).

[79] *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[80] *LEC Price Cap Order*, 5 FCC Rcd at 6807.

[81] *See* Section 61.49(d) of the Commission's Rules, 47 C.F.R. Section 61.49(d).

[82] *LEC Price Cap Order*, 5 FCC Rcd at 6806-09.

[83] NYNEX Request for Waiver of the Commission's Rules.

[84] Petition for Waiver of the Commission's Rules to Recover Network Depreciation Costs, FCC 93-522, X FCC Rcd XXX (adopted Nov. 29, 1993, released Dec. 8, 1993).

[85] *OPEBs Order*, 8 FCC Rcd 1024.

[86] *LEC Price Cap Order*, 5 FCC Rcd at 6808.

[87] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2665.

[88] Treatment of Local Exchange Carrier Tariffs Implementing Statement of Financial Accounting Standards, "Employers Accounting for Postretirement Benefits Other Than Pensions," 8 FCC Rcd 1024, 1033 (1993) (*OPEBs Order*); *see also* Section 61.49(d)(1)(vi) of the Commission's Rules, 47 C.F.R. Section 61.49(d)(1)(vi) (exogenous treatment will also be accorded to "other extraordinary exogenous cost changes as the Commission shall permit or require[.]").

64. The experience we have gained from using the exogenous cost mechanism leads us to believe that we should reduce the categories of cost changes eligible for exogenous treatment where this will improve price cap efficiency incentives. To some degree this is already happening as we complete the amortization of depreciation reserve deficiencies and inside wiring costs. In other cases, a tightening of the exogenous cost exceptions may be appropriate. For example, changes in Generally Accepted Accounting Principles (GAAP) are typically implemented in the Uniform System of Accounts (USOA) for telephone companies. However, a GAAP change may represent only a change in how books are kept and costs are recorded, not an economic cost change that might be expected to affect prices in competitive marketplaces.[89] In general, we believe that it would be more consistent with the incentives of a price cap plan to treat only economic cost changes as eligible for addition to the list of costs eligible for exogenous treatment. It should also be more consistent with one of the goals of price caps, to replicate the operation of competition. In the economy generally, one expects that accounting changes alone will not affect market-based prices. We request comment on whether we should narrow exogenous treatment of GAAP and USOA changes, for example, by limiting eligibility for exogenous treatment to economic cost changes. We request that commenters be very specific in identifying their reasons for disagreeing with the view that eligibility for exogenous treatment should be limited to economic cost changes.

65. It may also be useful to clarify and narrow the circumstances in which we would find that a cost change has a "disproportionate impact" on LECs. Many changes of laws, rules, or judicial decisions will affect different sections of the economy in different ways. The effect of such changes may be difficult to identify or quantify, and it can be even more problematic to determine whether the change is disproportionate for LECs. Moreover, we are concerned that it may be difficult to be consistent, and to identify all relevant changes. The LECs generally initiate requests for exogenous cost changes and have substantial incentives to report and request exogenous treatment only for those that might generate increases in the cap, not those that might justify reductions. We request comment on whether only cost changes that solely affect telephone companies or similar companies such as utilities should be eligible for exogenous cost treatment, and whether price cap LECs should be required to recognize all such changes consistently and to report such changes as part of their required tariff filings. Also, we request comment on whether we should adopt an administrative process to allow access customers or other groups to request exogenous treatment for cost changes.

66. Accordingly, based on our experience with the exogenous cost change rules, we solicit comment on the following issues:

Baseline Issue 6a: Whether the number of cost changes currently eligible for exogenous treatment under price caps should be reduced.

Baseline Issue 6b: If so, which cost changes should be eligible for exogenous treatment under price caps.

Baseline Issue 6c: Whether we should adopt an administrative process to allow access customers or other groups to request cost changes eligible for exogenous treatment and, if so, what should be the procedures in such an administrative process?

Baseline Issue 7: Service Quality, Infrastructure Monitoring, and Network Reliability

i. Background

67. In the *LEC Price Cap Order*, the Commission stated that it was committed to assuring the availability of high-quality, innovative communications services, and to the development of the telecommunications infrastructure needed to provide these services.[90] The Commission also stated that price cap regulation would encourage the LECs in network modernization, advanced applications, and new services. In considering suggestions that the implementation of price cap regulation for LECs could create cost-cutting incentives that might lead to degraded service and diminished investment in network modernization, we reaffirmed our belief that price cap regulation would increase the LECs' incentive and opportunity to develop and introduce new services, to invest in new technology like ISDN and SS7, to innovate, and to upgrade their networks. Further, we stated that the carriers would be unlikely to jeopardize their network infrastructure, because it is their primary asset and is critical to their continued financial stability.[91] Nonetheless, recognizing the need to ensure continued high quality service to ratepayers and our inability to predict with certainty the behavior of carriers operating under the price cap regulatory scheme, we decided to expand our monitoring of service quality and infrastructure development significantly to make sure that this goal was met.[92] We stated that increased monitoring would "enhance our ability to evaluate the price cap system and . . . ensure that the incentives created in the plan operate in the public interest."[93]

68. The Commission therefore determined that all price cap LECs would be required to file quarterly service quality reports, and that mandatory price cap LECs would also be required to file semi-annual service quality reports and annual infrastructure reports.[94] Under delegated authority, the Common Carrier Bureau established specific service quality and infrastructure reporting requirements[95] that "balance the need for data that will accurately reflect

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[89] *See, e.g., OPEBs Order*, 8 FCC Rcd 1024.

[90] *LEC Price Cap Order*, 5 FCC Rcd at 6827.

[91] *LEC Price Cap Order*, 5 FCC Rcd at 6827.

[92] *LEC Price Cap Order*, 5 FCC Rcd at 6827, 6829, *aff'd LEC Reconsideration Order*, 6 FCC Rcd at 2717-2719; *see also LEC Price Cap Order*, 5 FCC Rcd at 6827 (the Commission observed that state monitoring programs will "provide another layer of protection against degradation of service quality by the price cap LECs."); *see also LEC Price Cap Order*, 5 FCC Rcd at 6830 (the Commission stated that access competition would provide LECs with the impetus to develop their infrastructure).

[93] *LEC Price Cap Order*, 5 FCC Rcd at 6789; *see also id.* at 6830 ("In addition to the monitoring mechanisms . . . tariff filings, ARMIS reports, and the complaint process . . . [will] show service quality and infrastructure development.").

[94] *LEC Price Cap Order*, 5 FCC Rcd at 6827-39.

[95] *See* Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Memorandum Opinion and Order,

trends in service quality and infrastructure development with our goal of minimizing the administrative costs of LECs."[96]

69. In addition to LEC price cap service quality and infrastructure monitoring, the Commission has acted to assure network reliability by all carriers. Specifically, the Commission adopted rules requiring local exchange or interexchange common carriers operating either transmission or switching facilities to notify the Commission within 90 minutes if they experience service outages potentially affecting 50,000 or more customers and lasting 30 or more minutes.[97] The Commission investigates all such reported outages. The Commission has thus laid the foundation for systematic and comprehensive approaches to resolving outage problems. Also, the Commission chartered the Network Reliability Council (NRC) to provide the Commission and the industry with recommendations on how public telephone network outages can be avoided and, if they occur, how their impact can be minimized.[98] The NRC subsequently submitted recommendations which resulted in the *Service Outage NPRM* to amend the Section 63.100 outage reporting requirements.

ii. Current provisions

70. The quarterly service quality report includes information regarding installation and repair intervals for interexchange access and local service, trunk blockage, switch downtime, and service quality complaints filed with state or federal regulatory authorities.[99] We require price cap LECs to file their quarterly service quality reports by study area,[100] and to disaggregate data within the report by MSA and non-MSA for purposes of (1) local service installation and repair intervals, (2) switch downtime, and (3) service quality complaints.[101] Also, we require price cap LECs to disaggregate switch downtime data by switch size (number of lines served), and to report fully switch downtimes of two minutes or more and to identify the individual switch involved in the incident. In addition, we require price cap LECs to disaggregate interexchange access installation and repair intervals data by special access and switched access.[102] The semi-annual service quality report is filed by study area, and contains information concerning customer satisfaction, dial tone response and transmission quality.[103]

71. The annual infrastructure report provides information relating to switching equipment, transmission facilities, LEC call set-up time, access lines in service, access line gain, and total gross capital expenditures.[104] We require the mandatory price cap LECs to file infrastructure reports by study area and to disaggregate switching equipment data by MSA and non-MSA. *Id.*[105]

iii. Discussion

72. This NPRM offers a full opportunity for the Commission, assisted by the views of commenters, to consider whether we should take additional steps to assure that the LECs' service quality, network reliability, and infrastructure development remain at a high level. We therefore request comment on whether our service quality and network reliability monitoring requirements should be revised or clarified to assure they better serve their intended purpose. In particular, we request comment on whether our monitoring should be extended to facilities and services that may soon be interconnected with or provide capabilities similar to the local telephone network, *e.g.*, wireless services and coaxial cable. Service quality monitoring should be responsive to changes in technology and customer needs. As price cap LECs use wireless services, coaxial cable, and other facilities and services to perform the same functions and meet the same needs as existing telephone facilities, it may be appropriate to expand our service quality monitoring accordingly. Comments that relate to issues being considered in the *Service Outage FNPRM* in CC Docket No. 91-273 should, however, be submitted in that docket.

Baseline Issue 7a: Whether the Commission should increase or revise the monitoring of the LECs' network reliability, service quality, and infrastructure development. Commenters are requested to submit data, information, and proposals in this inquiry that in their view will contribute to assuring state-of-the art reliability, service quality,

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6 FCC Rcd 2974 (Com. Car. Bur. 1991) (*Service Quality Order), modified,* 6 FCC Rcd 4819 (Com. Car. Bur. 1991), *further modified,* Public Notice, Adjustments to Price Cap Carriers' Service Quality and Infrastructure Reports in ARMIS, 7 FCC Rcd 3590 (released Mar. 31, 1992), *further modified,* Public Notice, Modifications to Service Quality Infrastructure Reporting, 7 FCC Rcd 4632 (released July 7, 1992), *modified,* Public Notice, ARMIS Filing Requirements, 7 FCC Rcd 8795 (Com. Car. Bur., released Dec. 15, 1992) and *Erratum,* DA 92-1696 (Com. Car. Bur.; released Dec. 18, 1992), *further modified,* 8 FCC Rcd 7259 (Com. Car. Bur. 1993) (*Modified Service Quality Order).*

[96] *Service Quality Order,* 6 FCC Rcd at 2976.

[97] Amendment of Part 63 of the Commission's Rules to Provide for Notification by Common Carriers of Service Disruptions, 7 FCC Rcd 2010, 2010 (1992) (*Service Outage Order), recons. denied and granted,* CC Docket No. 91-273, Memorandum Opinion and Order and Further Notice of Proposed Rulemaking, 8 FCC Rcd 8517 (*Service Outage NPRM)* (1993); *see also* Section 63.100 of the Commission's Rules, 47 C.F.R. Section 63.100.

[98] *See* FCC News release, (released Dec. 13, 1991).

[99] *Modified Service Quality Order,* 8 FCC Rcd 7259, Attachment, FCC Report 43-05.

[100] A study area usually consists of a telephone company's service territory in a given state, although telephone companies occasionally have more than one study area in a particular state.

[101] *Modified Service Quality Order,* 8 FCC Rcd 7259, Attachment, FCC Report 43-05.

[102] *Id.*

[103] *Modified Service Quality Order,* 8 FCC Rcd 7259, Attachment, FCC Report 43-06.

[104] *Modified Service Quality Order,* 8 FCC Rcd 7259, Attachment, FCC Report 43-07.

[105] We require the LECs to file service quality and infrastructure reports in the Automated Reporting Management Information System (ARMIS) format. In the *ARMIS Order,* the Commission established an automated system for collecting from the Tier 1 LECs the financial and operating data necessary for the Commission to administer its accounting, separations, and access rules. *See* Automated Reporting Requirements for Certain Class A and Tier 1 Telephone Companies (Parts 31, 43, 67, and 69 of the FCC's Rules), CC Docket No. 86-182, Report and Order, 2 FCC Rcd 5770 (1987), *modified on recon.,* 3 FCC Rcd 6375 (1988) (*ARMIS Order).*

and infrastructure development for the LECs. Commenters also are requested to submit data identifying the administrative and business costs associated with their proposals.

Baseline Issue 7b: Whether and if so how the Commission should expand its service quality monitoring to include price cap LEC facilities and services that may be interconnected with the local exchange network or used to provide similar capabilities, including wireless services and coaxial cable. Commenters are requested to submit specific data on the administrative and business costs associated with their recommendations on the reporting requirements.

Baseline Issue 8: Rates and Regulations for New Services

i. Background

73. One of the Commission's primary objectives in adopting the LEC price cap rules was to provide carriers with incentives to become more innovative in the development and introduction of new, high quality services.[106] To advance this goal, while continuing to assure reasonable rates and terms, we established a special set of requirements for the introduction of "new services" intended to provide LECs with the flexibility to price efficiently and the incentive to innovate. There is evidence to suggest, however, that it may be necessary to revisit our new services requirements to determine: (1) whether these rules impose unnecessary regulatory impediments to the development and introduction of new services and, (2) if so, whether, and how, we should modify our rules to ensure that they support our goal of encouraging vigorous development of new and innovative services.

ii. Current provisions

74. The *LEC Price Cap Order* defines new services as services that add to the range of options already available to customers. A new service may, but need not, include a new technology or functional capability.[107] New services are not included under the price cap indices until the first annual price cap tariff filing after the completion of the base year in which the new service becomes effective.[108]

75. Under our current rules, tariff filings proposing new services that will be subject to LEC price caps must be made on a least 45 days' notice[109] and be accompanied by "detailed cost support[.]"[110] Specifically, a LEC introducing a new service is required to submit engineering studies, time and wage studies, or other cost accounting studies identifying the direct costs of providing the new service.[111] Cost support accompanying a LEC new service tariff filing must include: (1) a study containing a projection of costs for a representative 12-month period, (2) estimates of the effect of the new service on traffic and revenues, including the traffic and revenues of other services, and (3) supporting workpapers for estimates of costs, traffic, and revenues.[112] As part of the justification for the price selected for the new service, LECs may include an explanation of the need to earn "a risk premium" on investments in unusually risky new services.[113] A LEC seeking a risk premium must include an explanation of the methodology used to calculate the premium and the projected overall return for the service.[114]

76. To derive the overall price of the new service, LECs add a "reasonable" level of overhead costs.[115] LECs may load overhead on new services in a non-uniform manner, provided that LECs justify the deviations from uniform loadings.[116] Where a LEC develops a lower cost version of an existing service, the LEC's need to price the service so that the LEC breaks even would be an acceptable justification for non-uniform loadings.[117] Further, non-uniform overhead loadings are presumptively reasonable whenever a LEC uses them to justify the introduction of a new service at a level below the imputed "old" price of a substitutable service.[118] To support their overhead cost loadings, LECs are required to include in their new service tariff filings the ratios of direct unit cost to unit investment and direct unit cost to unit price.[119]

iii. Discussion

77. Ameritech states that our new services rules do not encourage innovation but, instead, impede and discourage the introduction of new services, reduce the LECs' ability to meet customer needs, and generate unreasonable filing costs for the LECs.[120] In particular, several LECs have

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[106] *LEC Price Cap Order*, 5 FCC Rcd 6786 at 6790, 6792, 6827, 6829.

[107] Policy and Rules Concerning Rates for Dominant Carriers, CC Docket No. 87-313, Second Report and Order, 5 FCC Rcd 6786, 6824, and Erratum, 5 FCC Rcd 7664 (1990) (*LEC Price Cap Order*), *modified on recon.*, 6 FCC Rcd 2637 (1991) (*Part 69 ONA Order*), *further modified*, 6 FCC Rcd 4524 (1991) (*Part 69 ONA Order*), *clarified and modified on second further recon.*, 7 FCC Rcd 5235 (1992) (*Second Further Reconsideration*), *further recon. pending.*

[108] *LEC Price Cap Order*, 5 FCC Rcd at 6824.

[109] *Id.* at 6825.

[110] *Part 69 ONA Order*, 6 FCC Rcd at 4524.

[111] *Id.* at 4531; *see also Second Further Reconsideration*, 7 FCC Rcd at 5237 (the Commission states that the requirements that price exceeds direct costs will prevent predatory pricing).

[112] *Part 69 ONA Order*, 6 FCC Rcd at 4531.

[113] *Part 69 ONA Order*, 6 FCC Rcd at 4531; *see also Second Further Reconsideration*, 7 FCC Rcd at 5237 ("[A risk premium is] defined as the additional rate of return a LEC needs to justify the development of a particularly risky new service.").

[114] *Part 69 ONA Order*, 6 FCC Rcd at 4531; *see also id.* ("To satisfy their burden of proof, carriers must provide evidence of comparably risky undertakings by firms in relevant industries, together with the cost of capital associated with the undertakings."); *see also id.* ("LECs should also include an on-the-record showing of the following information: (1) research and development expense and investment for the new venture; (2) marketing expense; (3) the type and functions of any new technologies employed; (4) an explanation of the method by which projected demand has been derived; and (5) any special elements of risk.").

[115] *Part 69 ONA Order*, 6 FCC Rcd at 4531.

[116] *Part 69 ONA Order*, 6 FCC Rcd at 4531.

[117] *Second Further Reconsideration*, 7 FCC Rcd at 5236.

[118] *Second Further Reconsideration*, 7 FCC Rcd at 5237. Consequently, LECs may price lower-cost versions of existing services at any level below the price of the existing service. *Id.*

[119] *Part 69 ONA Order*, 6 FCC Rcd at 4531. Our decision to adopt a flexible cost-based upper bound, which permits both non-uniform overhead loadings and risk premiums, was designed, in part, to "encourage[] LECs to develop improved versions of existing services and risky new innovative services[.]" *Second Further Reconsideration*, 7 FCC Rcd at 5235.

[120] *See, e.g.*, Ameritech Petition for Declaratory Ruling and Related Waivers to Establish a New Regulatory Model for the Ameritech Region (Ameritech Petition), Appendix at A-22 to

noted that the cost support requirements are so burdensome that they unnecessarily delay the introduction of new services.[121] Also, some LECs state that the 45-day notice period is so long that it inhibits them from responding to customer demands in a timely fashion.[122] As a consequence, LECs argue that they are prevented from effectively competing in an increasingly competitive telecommunications marketplace.[123] The LECs observe that the expectation of delay and the inability to compete freely deter them from introducing new services and lower prices.[124] Therefore, they assert, customers suffer from the diminished range and quality of available new technology.[125]

78. LECs also suggest that the price cap rules restrict the spectrum of available new services by controlling the prices LECs may charge for and the profit they may earn on new services.[126] They argue that the price cap rules, by limiting their ability to earn "above-normal" profits on successful new services, eliminate their incentive to incur the heavy costs which are involved in researching and developing new technology.[127] Further, LECs state that the cost support requirements for new services should be revised because the costs of and demand for new services are largely unknown.[128]

79. Although new services have been introduced under price caps, we believe there is some merit to these contentions. The development of cost support information in the reporting requirements, and the delay associated with notice requirements and tariff review under the current rules do generate delay and increase the costs of introducing new services. They may also inhibit the LECs' ability to compete with services offered by CAPs. Moreover, the process of reviewing new service cost support is often difficult and controversial, involving estimates and projections of customer response. Achieving a balance between the goals of encouraging innovation and achieving reasonable rates is thus especially difficult for new services. Moreover, current rules largely rely on regulatory review to detect and correct new service problems. The rules seek to detect unreasonably high or low rates, but fail to provide incentives for LECs to set new service rates at reasonable levels.

80. There are now several classes of services that the LECs may provide as new services, including access services subject to competition (*e.g.*, special access), monopoly access services (*e.g.*, electronic white pages and, in many cases, local switching), interconnection provided to competitors (*e.g.*, expanded interconnection service), and interexchange services (*e.g.*, intra-LATA interstate long distance services). During the past three years under price caps, the Commission has adopted expanded interconnection rules, which require the LECs to allow competitive access providers (CAPs) to interconnect with the LECs' networks. In the future, the LECs may be offering additional types and classes of new services, especially as they enter new service marketplaces. In marketplaces and geographic locations where LECs face some measure of actual or potential competition, LECs may have the incentive to price interconnection services their competitors buy unreasonably high, while pricing new services they offer in competition with CAPS, unreasonably low. In addition, LECs may have an incentive to price access services which face no competition unreasonably high.

81. Based on these considerations, we seek comment on whether the new services test should be modified. The twin, sometimes conflicting goals of the new services rules should be to encourage the introduction of new and innovative services and to ensure that the rates for new services are just and reasonable. We seek alternatives which will achieve our two goals, while reducing administrative burden for the LECs, the Commission, and other interested parties. For example, we seek comment on whether we should modify the new services test to reflect the several categories of services the LECs now offer. Specifically, we seek comment on whether we should adopt different tests or different levels of scrutiny for new access services subject to competition, new access services not subject to competition, and new interconnection services. Alternatively, we request comments on when structural or nonstructural (such as accounting safeguards) separation of new services might be required.

82. We also are interested in exploring ways to extend efficiency incentives to new services and thus provide a basis for reducing cost support requirements while improving the effectiveness of our review. For example, under the current rules, LECs file support for new service costs and, if the support is found to be acceptable, the rates are allowed to take effect. The rates are then automatically rolled into the applicable price cap basket index calculations in the next annual filing. In view of the uncertainty of new service demand projections, this may mean that the rates will turn out to be too high or too low when it is time to roll them into the appropriate price cap basket.

83. An alternative may be to defer some review of service costs until the time they are brought under price caps, at least for services that are initiated by the LECs themselves and do not present substantial issues of potential anticompetitive effects.[129] In light of our experience with the new services requirements under the LEC price cap rules, we solicit comment on this approach and on other possible approaches to improving our regulation of new services subject to price caps.

Baseline Issue 8a: Whether the LEC price cap new services requirements impose unnecessary regulatory impediments to the development and introduction of new services, with specific identification of what those impediments are and an assessment of their magnitude.

Baseline Issue 8b: Whether, and how, we should modify the LEC price cap new services procedures and cost support rules to ensure that these rules advance our goals of encouraging innovation and setting reasonable rates.

A-25; *see also* United States Telephone Association (USTA) Proposal for Streamlined Review of New Services (USTA Proposal) at 4.

[121] *See, e.g.*, Ameritech Petition, Appendix at A-23, A-24.

[122] *See, e.g., id.* at A-23; *see also* USTA Proposal at 4.

[123] *See, e.g.*, USTA Proposal at 4.

[124] *See, e.g., id.*

[125] *See, e.g., id.*

[126] *See, e.g.*, Ameritech Petition, Appendix at A-22.

[127] *See, e.g.*, Ameritech Petition, Supplemental Materials, Attachment 3 at 30.

[128] *See, e.g.*, Ameritech Petition, Appendix at A-22.

[129] For example, we would not expect to reduce initial support requirements for new services implementing Commission-mandated rule changes such as expanded interconnection.

Baseline Issue 8c: Whether new services are available on an equal basis to all LEC customers. Whether we should revise the LEC price cap plan to ensure the universal availability of new services. How widely available have LECs made new services to their customers?

Baseline Issue 9: Equalization of Regulations for LECs and CAPs

i. Background and Current Provisions

84. Under the AT&T price cap plan, changes in the charges that AT&T pays for access to the LECs' networks are deemed exogenous and, therefore, result in an adjustment to the AT&T price cap indexes.[130] In the *AT&T Price Cap Order* and the *AT&T Price Cap Order on Reconsideration*, the Commission considered proposals by LECs that cost savings resulting from an AT&T decision to bypass the local network and cost changes in non-LEC access charges also be treated as exogenous costs.[131] The LECs contended that all access costs should be treated alike and that excluding some forms of access from exogenous treatment creates a bias in favor of uneconomic bypass. The Commission determined, *inter alia*, that the small scale of CAP services and competition among the interexchange carriers would prevent any actual bias, and rejected the LECs' contention.[132]

85. In the *AT&T Price Cap Performance Report*, the Commission again considered LEC proposals that the Commission treat LEC and other access charges similarly.[133] Noting that the only remaining AT&T services subject to price caps are in Basket 1 and that these services use LEC switched access almost exclusively, the Commission found "no evidence that including any *de minimis* CAP access in Basket 1 exogenous cost changes would affect AT&T's actual price cap indexes, and thus its incentives."[134] We therefore concluded that there was no basis for changing the rule for computing AT&T's exogenous access costs.[135] However, we stated that if we were to allow switched transport interconnection, "the current method of calculating AT&T's exogenous access costs may create an actual bias, and any negative effects of this bias on competition among access providers and on customers may outweigh the considerations that support the current rules."[136] Accordingly, we indicated that as switched transport competition develops, we would reexamine the rules for computing AT&T's exogenous access costs.

ii. Discussion

86. The Commission recently adopted rules requiring Tier 1 LECs,[137] except National Exchange Carrier Association (NECA) pool members, to provide expanded interconnection for switched transport services to all interested parties.[138] In light of our expectation that these measures requiring expanded interconnection for switched transport will increase competition and our concern that the rules for computing AT&T's exogenous access costs may create an actual bias as switched transport competition develops, we believe that it is appropriate to consider revising our rules to equalize the treatment of LEC and CAP access rates in the calculation of AT&T's exogenous access costs. Also, our expectation of increasing access competition leads us to believe that there might be other rules and policies relating to price cap regulation which should be revised to equalize our treatment of LECs and CAPs. Accordingly, we request comment on the following issues:

Baseline Issue 9a: Whether our current rules for computing AT&T's exogenous access costs should be revised to equalize the treatment of LEC and CAP access rates in the calculation of AT&T's exogenous access costs.

Baseline Issue 9b: Whether any other rules or policies that relate to LEC price cap regulation should be revised to equalize our treatment of LECs and CAPs, and if so, what the revised rules and policies should be.

Baseline Issue 10: Sales and Swaps of Exchanges

i. Background and current provisions

87. The Commission's rules governing mergers and acquisitions provide that when a rate-of-return company and a price cap company merge, or when one company acquires the other, the resulting company must file tariffs pursuant to price cap regulation within one year of the effective date of the transaction.[139] In the absence of this rule, a company might attempt improperly to shift costs from its price-cap affiliate to its rate-of-return affiliate, allowing the rate-of-return affiliate to earn more revenue

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[130] Policy and Rules Concerning Rates for Dominant Carriers, Report and Order and Second Further Notice of Proposed Rulemaking, 4 FCC Rcd 2873, 3005 (1989) (*AT&T Price Cap Order*).

[131] *AT&T Price Cap Order*, 4 FCC Rcd at 3020, 3029-30, *on recon.*, 6 FCC Rcd 665, 673-74 (1991) (*AT&T Price Cap Order on Reconsideration*).

[132] *Id.*

[133] Price Cap Performance Review for AT&T, Report, 8 FCC Rcd 5165, 5168-69 (1993) (*AT&T Price Cap Performance Report*).

[134] *AT&T Price Cap Performance Report*, 8 FCC Rcd at 5169.

[135] *Id.*

[136] *Id.*

[137] Tier 1 LECs are companies having annual revenues from regulated telecommunications operations of $100 million or more for a sustained period of time. Commission Requirements for Cost Support Material to be Filed with 1990 Annual Access Tariffs, 5 FCC Rcd 1364, 1364 (Com. Car. Bur. 1990) (defining Tier 1 LECs using the criteria to define Class A companies in 47 C.F.R. Sections 32.11(a) and 32.11 (e)).

[138] *See* Expanded Interconnection with Local Telephone Company Facilities and Amendment of Part 36 of the Commission's Rules and Establishment of a Joint Board, Second Report and Order and Third Notice of Proposed Rulemaking, CC Docket No. 91-141, FCC 93-379, Transport Phase I and CC Docket No. 80-286, 8 FCC Rcd 7373 (1993).

[139] *LEC Price Cap Order*, 5 FCC Rcd at 6821, *affirmed on recon., LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706, *affirmed on appeal, National Rural Telecom Association v. FCC*, 988 F.2d 174 (D.C. Cir. 1993); *see also* Section 61.42(c)(2) of the Commission's Rules, 47 C.F.R. Section 61.42(c)(2). The merger and acquisition rule is ancillary to the "all-or-nothing," "permanent choice," and "depooling" rules under the LEC price cap plan. The all-or-nothing rule requires price cap LECs to convert all their cost affiliates (except their average schedule affiliates) to price cap regulation as well. *LEC Price Cap Order*, 5 FCC Rcd at 6819-6820, *affirmed on recon., LEC Price Cap Reconsideration Order*, 6 FCC Rcd 2637, *affirmed on appeal, National Rural Telecom Association v. FCC*, 988 F.2d 174 (1993). The permanent choice rule provides that a LEC's decision to elect price cap regulation is irrevocable. *LEC Price Cap Order*, 5 FCC Rcd at 6819, *affirmed, National Rural Telecom Association v. FCC*, 988 F.2d 174 (1993). Under the depooling rules, LECs and their affiliates are required to withdraw from the National

(because of its greater revenue requirement) while generating greater earnings for the price cap affiliate without triggering the sharing mechanism.[140] Further, if a LEC were allowed to alternate between rate of return regulation and price cap regulation, "it could game the system' by building up a large rate base under rate of return regulation, then opt for price caps again and cut its costs to an efficient level."[141] The Commission stated, however, that in some cases, the efficiencies created by the purchase and sale of one or two exchanges may outweigh the threat of "gaming the system." We therefore determined that "[s]uch cases might justify a narrow waiver of the all-or-nothing rule."[142]

ii. Discussion

88. The Commission has granted several waivers of the price cap rules prohibiting sales and swaps that move exchanges out of price cap regulation. These transactions can, we believe, improve efficiency and service quality for example by permitting neighboring exchanges to share administrative costs. These transactions can also promote better infrastructure development by placing exchanges in control of another LEC whose business plan makes it more committed to developing improved service in the exchange. However, we are concerned that the waivers may increase access rates unnecessarily. A waiver that permits a price cap LEC to sell an exchange with relatively high costs and permits the new buyer to move the exchange back to cost-plus rate of return regulation, for example, may not reduce the price cap LEC's rates, but may permit higher, cost-based rates to be filed by the buyer. The transaction may also increase burdens on FCC support programs targetted to help small, high-cost exchanges such as Universal Service Fund subsidies (USF) or the triple weighting of Dial Equipment Minutes (DEMs) used for jurisdiction separations by small companies.[143] The expectation of obtaining a waiver might also generate unintended incentives, such as encouraging a price cap LEC to postpone modernizing high-cost exchanges that it can sell to a cost-based company. Although we believe that the waiver process should continue to be available for sales and swaps that make economic sense, we propose considering methods of preventing any unintended windfalls and transactions that artificially increase subsidies. These methods may include exogenous cost deductions for the amount of any increase in USF or CCL rates. We seek comment on whether waiver guidelines or restrictions are needed. We specifically solicit comments on whether the current policies associated with USF subsidies applicable to sales and swaps of exchanges are appropriate, and what policies for sales and swaps of price cap exchanges are most consistent with the goals of infrastructure development. We also ask to what extent current policies or modified policies will encourage infrastructure development and universal access.

89. Accordingly, in light of these concerns, we solicit comment on the following issue:

Baseline Issue 10: Whether, and how, the process for granting waivers of the price cap rules governing mergers and acquisitions or the price cap rules themselves should be revised so as to prevent unreasonable cost shifting and maintain the efficiency incentives of the LEC price cap plan.

Baseline Issue 11: Other Revisions to the Current LEC Price Cap Plan

90. This proceeding is intended to be a comprehensive review of LEC price caps. Commenters may also wish to suggest other revisions to the baseline plan in their comments. The comments should list and identify each such issue separately.

Baseline Issue 11: Whether the Commission should adopt revisions to the baseline LEC price cap plan in areas other than those specifically discussed in this Notice.

Baseline Issue 12: Relationship to Other Proceedings

91. The fourth-year review of LEC price caps is intended to be comprehensive in its analysis of the price cap plan, evaluating all aspects of LEC performance and any adjustments of the plan that are warranted. Commenters should submit all data, information, and analysis relevant to LEC performance under price caps that they believe will help us in this review. They are also of course free to propose changes they believe will improve the plan. However, many of the issues that might affect the LEC price cap review overlap with other Commission proceedings, as well as with regulatory reform proposals already developed. A non-exhausive list of these proposals includes proceedings to implement expanded interconnection, the transport rate restructuring proceeding, Ameritech's petition for a declaratory ruling to establish "a new regulatory model", Rochester Telephone's proposed "Open Market" Plan, NARUC's Petition for Notice of Inquiry Addressing Access Issues, and USTA's Petition for interstate access reform. We are not seeking comment on these proceedings or petitions in this docket, but it is likely that any decisions in this docket must be consistent with decisions made in other proceedings. We do request comment on how the Commission can best harmonize the review of LEC price caps with other proceedings and proposals.

Baseline Issue 12: How the Commission should coordinate the LEC price cap review and any changes in the LEC price cap plan with other proceedings and proposals.

Exchange Carrier Association (NECA) pools as a prerequisite to price cap participation. *LEC Price Cap Order*, 5 FCC Rcd at 6819. However, average schedule companies are allowed to remain in the NECA pools if they continue to operate as an average schedule company and "their depooling affiliate is depooling for the express purpose of changing from rate of return to price cap regulation." *LEC Price Cap Order*, 5 FCC Rcd at 6820.

[140] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

[141] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706.

[142] *LEC Price Cap Reconsideration Order*, 6 FCC Rcd at 2706 n.207. The Common Carrier Bureau has waived the rules governing mergers and acquisitions under price caps. *See, e.g.*, US West Communications and Gila River Telecommunications Inc., 7 FCC Rcd 2161 (Com. Car. Bur. 1992); *see also* US West Communications, Inc. and Emery County Farmers' Union Telephone Association, 7 FCC Rcd 6076 (Com. Car. Bur. 1992).

[143] *See* Section 36.125 of the Commission's Rules, 47 C.F.R. Section 36.125.

D. Transitional Issues For Comment

92. While the price cap plan gives LECs greater incentives to operate efficiently and greater flexibility in setting rates, it does impose significant regulatory constraints upon carriers. Such constraints may become unnecessary or counterproductive when market forces generated by competition effectively assure reasonable, and not unreasonably discriminatory rates. Rate regulation in these circumstances may impede the incumbent carrier's ability to compete vigorously rather than protecting customers or achieving the other goals of the Communications Act. In the case of AT&T, for example, price caps proved to be a transitional form of regulation for many services, which have since moved from price caps into streamlined regulation as competition increased.

93. For the price cap LECs, technological changes and Commission decisions such as the requirement that the LECs provide expanded interconnection of their facilities with competitors', have laid a foundation for competition in the market for local exchange access services. The deployment of PCS services within the next few years may provide additional competition. Increased competition within local exchange areas now seems inevitable, even if the level of competition that will result cannot be predicted with any certainty and may differ where local market conditions differ.

94. This Commission has long sought to encourage full and fair competition in telecommunications markets, and we continue to believe that vigorous competition is generally better able to serve the public interest than a regulated monopoly. The LECs currently dominate the provision of access services. Regulatory oversight and rate regulation may be necessary to protect both customers and competitors of the price cap LECs until and unless effective competition occurs. On the other hand, price and service regulation of the LECs could unnecessarily restrict the LECs' ability to compete, and thus deny the full benefits of competition to consumers. We anticipate that, aided by the comments, our task in this proceeding will be to resolve these conflicting concerns in a way that best achieves the purposes of the Communications Act. For the present, we propose no transition plan for price caps. Rather, we expect to use this proceeding to develop data and information relevant to fashioning a workable plan for revising the baseline price cap model as competition develops.

Transition Issue 1: Criteria for Reduced or Streamlined Regulation of Price Cap LECs

95. The most likely basis for applying more streamlined regulation to LECs is that the LECs' market power has been reduced, and competition has increased. To the extent that a LEC no longer controls essential, "bottleneck" facilities, regulations needed to protect against abuse of a monopoly may be unnecessary. Among the criteria for assessing LEC market power are the nature and extent of any barriers to market entry and exit (*e.g.*, regulatory, economic, or technological obstacles), the existence of potential and actual competitors, the extent to which those competitors have the facilities to serve LEC customers, the willingness of customers to use competitors' services, and the competitors' market share. These criteria may differ in particular geographic locations or regions, possibly warranting different levels of regulation in different regions. The weight we would accord these criteria may differ for different services, or may be contingent on other events. We also may wish to consider the effects of the transition on other markets, for example, interexchange, video, and information. We request comment on the current state of competition in providing local exchange and interstate access, and the most relevant and useful criteria for determining when to adopt streamlined regulation and data relevant to such criteria.

Transition Issue 1a: What is the current state of competition for local exchange and interstate access?

Transition Issue 1b: What criteria if any should be used for determining when reduced or streamlined regulation for price cap LECs should take effect? For example, in determining whether a service is subject to sufficient competition to be moved from price cap regulation to reduced or more streamlined regulation, should the Commission take into consideration (1) the nature and extent of any barriers to market entry and exit (*e.g.*, regulatory, economic, or technological obstacles), (2) the existence of potential and actual competitors and, if so, what role should the existence of potential and actual competition play in determining whether to reduce or streamline LEC price cap regulation, (3) the extent to which those competitors have the facilities to serve LEC customers, (4) the willingness of customers to use competitors' services and, if so, how should this criterion be measured, (5) the competitors' market share and, if so, how should the term "market" be defined, (6) pricing trends, (7) the effect of expanded interconnection, (8) differences in competition in different geographic locations or regions, and differences in demographic characteristics, such as whether services are available to all groups within a broad community or area, or (9) other factors.

Transition Issue 1c: In what circumstances will a LEC no longer control essential "bottleneck" facilities for some or all of its services? How will the Commission be able to identify these circumstances in practice?

Transition Issue 1d: What ability do CAPs and others have to compete with the LECs? What data indicate the level of actual and potential competition from CAPs and other providers? For example, such data may include the CAPs' profit levels, stock price trends, revenues, or other measures which reflect the CAPs' ability to compete.

Transition Issue 1e: What impact should price cap LEC entry into related industries (*e.g.*, cable TV) and BOC entry into inter-LATA marketplaces have on the LEC price cap plan?

Transition Issue 2: Transition Stages

96. Once the criteria for assessing LEC market power are established, the specific regulatory methods for reducing or eliminating price cap regulations would be set. These might include some combination of widening the price cap bands, moving specific baskets or services out of price caps, and reducing tariff filing requirements.

Transition Issue 2: What regulatory methods for reducing price cap regulation or streamlined regulation should be adopted for LEC services as those services become subject to greater competition?

Transition Issue 3: Revisions to Baskets

97. The speed with which effective competition develops is likely to differ among LEC baskets and services as it has among AT&T's. Interconnection is likely, for example, to bring competition for transport earlier than for local switching or common lines. This may imply a need for

revising the baskets to group services with similar levels of competition or to set different schedules for reduced or streamlined regulation.

Transition Issue 3: Whether and how the Commission should schedule revisions in the composition of price cap baskets as local exchange access competition develops. Should the Commission adopt a set of procedures that would rebalance baskets in response to specified changes in market conditions?

Transition Issue 4: Service Quality, Network Reliability, and Infrastructure

98. Competition in local exchange access services is likely to develop unevenly. This in turn may encourage price cap LECs to direct repair, maintenance, introduction of new services and features, and other efforts toward downtown businesses and affluent residential customers. Inner cities, rural areas, and the less well-off might see fewer benefits from competition, or even declines in service quality. These potential effects of competition may warrant revising the LEC price cap monitoring program as part of any transition plan.

Transition Issue 4: Whether and how the Commission should revise its monitoring of LEC service quality, network reliability, and infrastructure as part of any transition plan.

Transition Issue 5: Frequency of Review under Price Cap Regulation

99. Our approach to keep abreast of the transitional regulatory changes that might be needed in the years ahead might be to review the LEC price cap plan more often than every fourth year. For example, a review might be completed every second year, or every year, possibly limited to issues of the level of competition that has developed and whether competition warrants moving services into other baskets or streamlined regulation. However, more frequent review may raise other concerns. In addition to the administrative burdens, frequent review might undermine the price cap efficiency incentives, if LECs perceived that any profits they stand to gain from undertaking projects to increase long term efficiency might be eliminated by the Commission at the review stage. Alternatively, the Commission might monitor and report on LEC price cap plan performance regularly, in order to evaluate when revisions to the plan or additional transitional steps should be implemented.

Transition Issue 5: When should the Commission next review the price cap LECs' performance? How frequently should the Commission conduct subsequent reviews?

Transition Issue 6: Other Transition Issues

100. There are likely to be other issues that may be relevant to developing an effective transition plan. We invite comment and analysis on such issues.

Transition Issue 6: Whether and how the Commission should adopt changes in rules and policies other than those specifically mentioned in this Notice as part of a LEC price cap transition plan.

IX. PROCEDURAL MATTERS

101. This review will be conducted as a non-restricted notice and comment rulemaking. *See* 47 C.F.R. Section 1.399 *et seq.*

102. All relevant and timely comments and reply comments will be considered by this Commission. In reaching our decision, this Commission may take into account information and ideas not contained in the comments, provided that such information or a writing containing the nature and source of such information is placed in the public file, and provided that the fact of this Commission's reliance on such information is noted in the Order.

Regulatory Flexibility Act

103. We certify that the Regulatory Flexibility Act of 1980 does not apply to this rule making proceeding because if the proposed rule amendments are promulgated, there will not be a significant economic impact on a substantial number of small business entities, as defined by Section 601(3) of the Regulatory Flexibility Act. Carriers subject to price cap regulation for local exchange access services affected by the rule amendments under consideration generally are large corporations or affiliates of such corporations. The Secretary shall send a copy of this Notice of Proposed Rule Making, including the certification, to the Chief Counsel for Advocacy of the Small Business Administration in accordance with paragraph 603(a) of the Regulatory Flexibility Act, Pub. L. No. 96-354, 94 Stat. 1164, 5 U.S.C. Section 601 *et seq.* (1981).

Electronic Filings and Docket Database

104. In the AT&T performance review, we requested that commenters submit copies of their comments on IBM PC compatible diskettes as a test of methods to improve the ability of the Commission and the public to review and evaluate the data and information submitted in the docket. Many of the commenters in that proceeding submitted their comments on diskettes and these comments were included in a data base in the Common Carrier Bureau Industry Analysis Division Bulletin Board. This data base was of value in that proceeding, but we encountered some problems in making the data base as useful as it might have been. Not all commenters submitted their filings on diskettes and the diskettes were generated by several different, incompatible software programs. We believe that an improved data base should be even more useful for this proceeding, which affects more carriers and, perhaps, more complex issues. We delegate authority to the Common Carrier Bureau to establish procedures to establish a useful computerized public data base for this proceeding, and as a further test of methods to improve the Commission's notice and comment procedures.

Ex Parte Rules - Non-Restricted Proceeding

105. This is a non-restricted notice and comment rulemaking proceeding. *Ex parte* presentations are permitted, except during the Sunshine Agenda period, provided they are disclosed as provided in Commission rules. *See generally* 47 C.F.R. Sections 1.1202, 1.1203, and 1.1206(a).

X. ORDERING CLAUSES

106. Accordingly, IT IS ORDERED that NOTICE IS HEREBY GIVEN OF the rulemaking described above and that COMMENT IS SOUGHT on these issues.

107. IT IS FURTHER ORDERED that pursuant to applicable procedures set forth in Section 1.399 and 1.411 *et seq* of the Commission's Rules, 47 C.F.R. Sections 1.399, 1.411 *et seq.*, comments SHALL BE FILED with the Secretary, Federal Communications Commission, Washington, D.C. 20554 on or before April 18, 1994, and reply comments SHALL BE FILED on or before May 17, 1994. To file formally in this proceeding, participants must file an original and four copies of all comments, reply comments, and supporting comments. If participants want each Commissioner to receive a personal copy of their comments, an original plus nine copies must be filed. In addition, parties should file two copies of any such pleading with the Tariff Division, Common Carrier Bureau, Room 518, 1919 M Street, N.W., Washington, D.C. Parties should also file one copy of any documents filed with this Commission's copy contractor, International Transcription Service, Inc., Room 246, 1919 M Street N.W., Washington, D.C. 20554. Comments and reply comments will be available for public inspection during regular business hours in the FCC Reference Center, Room 239, 1919 M Street, N.W., Washington, D.C. 20554.

108. IT IS FURTHER ORDERED that this proceeding will also be a test of methods to improve Commission notice and comment procedures through computer-based filing and docket management approaches. The Commission directs the Chief, Common Carrier Bureau to issue notices and orders necessary to implement this test. We also request the views of interested parties on ways to use computers to improve filing procedures as part of the comment in this proceeding. The Commission strongly urges interested parties to participate in this test.

FEDERAL COMMUNICATIONS COMMISSION

William F. Caton
Acting Secretary

SEPARATE STATEMENT

OF

COMMISSIONER ANDREW C. BARRETT

RE: Price Cap Performance Review for Local Exchange Carriers

In this Notice of Proposed Rulemaking ("Notice"), the Commission begins the fourth year review of the performance of the local exchange carriers (LECs) under price cap regulation. More specifically, the Notice seeks comment on several "baseline" issues regarding potential ways to improve the existing LEC price cap plan, including: (1) potential modifications to the composition of the price cap baskets and bands, (2) possible changes in the productivity factor, (3) whether to amend the rate of return thresholds triggering the sharing mechanism, (4) whether the Commission should reconsider the application of the formula for common line charges, and (5) changes in the definition of circumstances that could warrant "exogenous cost" treatment. In addition, the Notice seeks comment on issues related to a transition to a more streamlined means of regulating the LECs.

The Commission must remain aware of the pending public policy issues -- especially pending legislation that would eliminate regulatory obstacles to competition in local exchange markets -- as we prepare to evaluate the comments that result from this Notice.[1] As we consider potential modifications to the LEC price cap mechanism, as well as today's attendant action to adopt revisions in the baskets and bands to create a new "trunking" basket that combines the transport and special access services,[2] the Commission begins the critical steps of moving beyond traditional price cap regulation. Indeed, the revisions to the price cap baskets will create appropriate groupings of the transport and special access services that use similar facilities and are subject to similar competitive pressures. This action could facilitate decisions in the future that will allow the Commission to significantly modify or eliminate the LEC price cap mechanism in response to the evolution of competitive markets for special access and transport services.

In this review of the LECs' performance under price caps, I am interested in considering how the Commission may facilitate movement toward a regulatory framework for the local exchange carrier industry that will more realistically reflect the industry's unique and rapidly changing structure, costs, and investment needs. At the same time, I am concerned that the regulatory mechanism must provide incentives for telephone companies to invest in more risky

[1] See H.R. 3626, sponsored by Rep. Jack Brooks and Rep. John D. Dingell; H.R. 3636, sponsored by Rep. Edward J. Markey and Rep. Jack Fields; S. 1086, sponsored by Sen. John C. Danforth and Sen. Daniel K. Inouye. For a brief comparison of the various legislative proposals, see Broadcasting & Cable, January 3, 1994, at 51.

[2] See Second Report and Order, CC Docket No. 91-213, adopted January 19, 1994.

endeavors in the marketplace while requiring that the companies bear the burdens associated with the increased risks rather than subsidizing the new endeavors at the expense of customers who do not want such services.[3] Presently, I do not believe that we are at a point where the public can rely on the market to set prices for all services, especially with respect to services provided to residential areas. Yet, I do believe that rapid changes in the local exchange marketplace will underscore the importance of transitioning toward a streamlined regulatory structure where sources of competition are evident in the local marketplace. Thus, I believe we must begin the transition, where possible in specific services, toward reducing the Commission's link between prices and earnings on a rate base. I also am interested in specific comments as to how the Commission can allow more pricing flexibility based on a correlation to cost in markets where competition has developed.

With these considerations in mind, I especially am interested in comments on several issues raised in this Notice. First, it is imperative to develop specific criteria for identifying competition for particular services, as well as to establish thresholds that might trigger the transitional regulatory mechanisms. In doing so, I am concerned that we determine how to monitor the extent that equal levels of service are available throughout all regions and to all demographic groups of a broad community. Next, given the LECs' recent history of downsizing in order to increase efficiency,[4] I am interested in the extent to which a revised price cap or transitional regulatory mechanism could result in net benefits to future economic development, perhaps through additional jobs or market opportunities for the LECs in other areas of business, or new market opportunities for third parties. Thus, I particularly am interested in specific comments regarding the types of jobs or market opportunities that have been created since the LECs have operated under the price caps. Finally, I am interested in the extent to which our expanded interconnection rules and the LEC price cap structure will promote network quality and efficiency of service in the local exchange marketplace.

[3] See "Beyond Price Caps: Escaping the Traditional Regulatory Framework," Commissioner Andrew C. Barrett, Federal Communications Commission, delivered before Florida Economic Club, August 27, 1992 (on file in the Office of Commissioner Andrew C. Barrett).

[4] See "Tightening Their Belts", Telephony, December 20, 1993, at 12 (detailing statistics for downsizing by Bell regional holding companies between 1984 and 1992).

*U.S. Government Printing Office: 1994 — 300-842/00015